

NO. 40789-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM N. VALDIVIEZ,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY CLERK
COURT OF APPEALS
DIVISION TWO

CONSOLIDATED BRIEF OF CROSS-RESPONDENT
AND REPLY BRIEF OF APPELLANT

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ORIGINAL

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A. INTRODUCTION TO ARGUMENT IN REPLY

In an attempt to persuade this Court that it cannot reach the merits of the Appellant's claims regarding improper denial of his right to cross-examine the key witness against him, the State raises a host of spurious procedural objections. The State claims that Appellant's trial counsel:

- “[D]id not preserve this issue on appeal”;¹
- Did not “mak[e] a satisfactory “offer of proof” as to what his proposed cross-examination would reveal;²
- Did not “request[] a final ruling on the matter”;³
- failed to explain the impeachment purpose of his cross-examination;⁴
- that trial counsel's proposed cross-examination “went beyond the scope of direct examination;”⁵
- that trial counsel never argued that the proposed cross-examination was proper because it would disclose the making of inconsistent statements;⁶ and
- failed to cite to Evidence Rule 608(b).⁷

In addition, the State confuses the rules pertaining to a party's right to conduct cross-examination with the rules pertaining to a party's right to present extrinsic evidence in his own case-in-chief. The State makes

¹ *Brief of Respondent*, at 20.

² *Id.* at 20, 21-22

³ *Id.* at 20

⁴ *Id.* at 18, 26.

⁵ *Id.* at 18

⁶ *Id.* at 28

⁷ *Id.* at 9 & 12.

meaningless arguments about what Valdiviez could have done *if* the trial judge *had* allowed him to ask R.M. if she had ever told lies on the internet about her age, *and if* R.M. had answered that question in the negative. But Valdiviez was never allowed to ask the cross-examination question: “Did you lie about your age in a message posted on the internet?” So the issue of whether Valdiviez could have presented extrinsic evidence to show that she was lying had she answered this question by saying “no,” simply never arises.

Finally, even if Valdiviez had completely failed to raise the issue of the restriction of his right of cross-examination in the trial court, he could still raise this issue on appeal because it is error of constitutional magnitude in a criminal case to prevent cross-examination of a critical prosecution witness whose credibility is at the heart of the only disputed issue in this case.

B. ARGUMENT IN REPLY

1. VIOLATION OF THE RIGHT OF CROSS-EXAMINATION

- a. **As the Prosecution Concedes In Its Brief, The Trial Judge Did Make a “Final Ruling” on The Prosecution’s Motion in Limine to Prohibit The Defendant From Cross-Examining R.M. on the Subject of Her Having Made a False Representation As to Her Age on The Internet.**

Strangely, the State argues that Valdiviez’s trial attorney did not preserve the cross-examination issue on appeal “by requesting a final ruling on the matter at the proper time during the trial.” *Brief of Respondent*, at 20. Somehow, on this page of its brief the State seems to have forgotten what it recognizes elsewhere in the brief: *The State* was

the moving party on this issue. *The State* moved in limine to prohibit cross-examination of R.M. on the issue of false representations as to her age which were made in connection with her posted YouTube video. *The State* filed written pretrial motions in limine. CP 89-91. The very first prosecution motion in limine sought a court order stating that the defendant “may not play video entitled Bella2234 (exhibit one herewith) (or similar videos) at trial.” CP 89.

On the second day of trial⁸ the State argued that there should be no reference to the YouTube video and asserted that it was “not clear” whether the defense “plans to use this during his cross-examination of Rebecca Morgan and, if so, what – what . . . relevance it has.” RP 3/30/10 at 8-9. The judge asked defense counsel “when were you anticipating possibly using it?” and defense counsel answered plainly: “During cross examination.” *Id.* at 9. Because the trial judge did not want to delay bringing the jury into the courtroom, resolution of the State’s motion in limine was delayed until later in the trial. *Id.*

When the issue next came up the prosecutor argued strenuously in support of its motion in limine to preclude any reference to or questioning about the YouTube post during cross-examination of R.M.:

I would say they have a foundational requirement ***before they can even ask – raise this in cross-examination.*** They have to show

⁸ Because he could not “open up” the computer disk that had the video on it, the trial judge was unable to make a ruling on this issue on the first day of trial when he ruled on all the other pretrial motions in limine made by the State. “The court was unable to open and view Exhibit J. The Court will view [it] Monday a.m. if this problem is solved. Court will phone computer services for assistance this a.m.” CP 145.

that he [the defendant] believed it, which would come in their – logically in their – when they present their case. . . .

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 in thinking that she was actually 19 instead of what her age was.

RP 3/30/10, at 108-09 (emphasis added).

It is completely understandable why the prosecutor wanted to preclude cross-examination of R.M. on the subject of lying about her age on the internet because no matter what answer R.M. gave, the defense was going to score big points. If she admitted she had lied on the internet by posting a claim that she was 19 years old, then the defense would benefit by being able to show that R.M. had previously lied about her age, thus making R.M.'s testimony that she did not lie about her age on the day of the charged rape a lot less credible. If she denied that she lied on the internet post, then defense counsel would simply show her the posted video and force her to admit that she was one of the two young women depicted in the video, and that the video contained the introductory statement that they were 19 years old. Either way R.M. would be revealed as a person who lied, and who lied about her true age.

Defense counsel argued that he should not be forced to forego cross-examination of R.M. on this subject, and required to first present testimony from the defendant regarding his beliefs as to her age, before he could then recall R.M. during the defense case in order to ask her questions on direct examination as to whether she had made false representations about her age on the internet.

She has certainly testified as to representations she made about age in discussions that were held between her and Mr. Valdiviez 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.

RP 3/30/10, at 111-12.

The trial judge certainly understood he was being asked to make a ruling on the scope of cross-examination. The judge explicitly stated he was going to handle the issue like he would handle any other issue regarding an objection to a question asked on cross-examination:

I'll just handle – on cross I'm just going to handle that as – you [defense counsel] have – I assume you [the prosecutor] have more direct. *I'm going to just handle the objections on cross as I would any other cross and I'll cover those as we get to them.*

RP 3/30/10, at 114 (emphasis added). Moreover, the trial judge ruled that defense counsel was *not* to ask any cross-examine question on this subject without first getting the court's permission to do so. The trial judge instructed defense counsel that when he got to the point of wanting to ask the question that the State objected to – have you made statements over the internet in which you falsely claimed to be older than you really were? -- defense counsel must stop before asking that question. At that point, “rather than a sidebar, just ask that you have a motion and I'll just excuse the jury rather than – [make a ruling at sidebar],” and then the judge would rule in the absence of the jury on whether the question could be asked. RP 3/30/10, at 114. As the prosecution expressly notes in its brief: “The court ruled that there would be no mention of the YouTube posting during

cross-examination of the witness.” *Brief of Respondent*, at 14, citing to RP 3/30/10, at 114.

After this colloquy, the prosecutor finished his direct examination of R.M. and defense counsel began his cross-examination of her. *Id.* at 119. After covering some other subjects, defense counsel questioned R.M. about conversations she had had with the defendant, and with the defendant’s mother, shortly before she came to Washington State for the family Christmas get together. Conforming to the judge’s instructions, defense counsel stopped when he got to the point where he wanted to pose the question whether R.M. had told lies about her age on the internet:

Q. Okay. Now, leading into this – this trip, you spoke to my client on several occasions, correct?

A. Yes.

Q. All right. And isn’t it true that during those – those were phone calls, right?

A. Yes.

Q. Okay. And isn’t it true that during those phone calls you told him that you’d be turning 16 during the trip?

A. No.

Q. Okay. You also mentioned to Vivian Smith that would be turning 16 during this trip, didn’t you?

A. No.

Q. Okay. But you did speak with her in the months leading into this, correct?

A. No. I spoke with – I spoke with my grandparents and I spoke with William.

Q. Okay.

MR. BUSTAMANTE: your Honor, *I'm going to object to this line of questioning as outside the scope of direct.* If Mr. Hester wants to call her back later in his case, that's fine.

THE COURT: *This particular objection is overruled.*

You may continue.

MR. HESTER: Thank you, Your Honor. I would like to be heard on another – another issue that we've discussed earlier today.

THE COURT: Thank you.

Members of the jury, please return at this time to the jury room. I'll have you come back as soon as I can.

RP 3/30/10, at 126-127 (emphasis added).

After the jury left the courtroom, the trial judge told the witness, R.M., to step out of the courtroom, and the attorneys made further argument. *Id.* at 128-29. Defense counsel then reasserted his desire to ask R.M. questions about her having made false statements that she was older than 16 in “the internet world”:

MR. HESTER: . . . [T]his is exactly where I would be – *this is in my examination where I would plan on asking her if she in fact has 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 [the internet post] would become relevant.

Id. at 129 (emphasis added).

The trial judge then thanked defense counsel for having followed the procedure of stopping his cross and asking for a ruling. *Id.* He then asked the prosecutor for his thoughts and the prosecutor made two objections, one of which the judge had essentially already overruled:

MR. BUSTAMANTE: . . . I have two objections to this entire line of questioning. First, *it is beyond the scope of direct*. Second, he's eliciting hearsay and there's no exception to hearsay that I'm aware of. . .

Id. at 130 (emphasis added).⁹

When the trial judge took up the prosecutor's objections, he specifically asked defense counsel to address the objection that his proposed cross-examination about the false age representation on the internet was beyond the scope of the State's direct examination:

THE COURT: . . . Now, regarding continuing examination, Mr. Hester, on beyond the -- your argu -- *what's your response to Mr. Bustamante's that you're into an area now beyond the scope of the direct?*

MR. HESTER: I couldn't disagree more. I think that they have addressed this, or the State's addressed this on direct when it talked about these claimed conversations; that the [prosecution's] purpose [for presenting evidence] 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.* . . .

Id. at 148 (emphasis added).

The trial judge then asked defense counsel whether he was going to go beyond asking R.M. whether she had lied on the internet. He inquired whether defense counsel was specifically going to cross-examine her about the statement she had posted on the internet, a copy of which had been marked for identification as Exhibit K. Defense counsel replied that

⁹ The prosecutor also wanted to make a record on a completely different issue that had been raised at a sidebar conference held during the witness' examination, and so the trial judge took that matter up first. The sidebar conference issue was then discussed for several minutes and ended with the trial judge making on a ruling on that issue. *Id.* at 130-147.

if she answered that she had never made any such statement on the internet, then the internet post would be a prior inconsistent statement:

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 going to lead 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 accurately as prior inconsistent statements on the issue of age representation, the statutory defense that we've discussed at 9A.44.030.

Id. at 148-49.

Defense counsel and the trial court then discussed the issue of the proper construction of the subsection of the statute which defined the affirmative defense of a reasonable mistake as to the victim's true age. RCW 9A.44.030(2) provides in pertinent part:

[I]t 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.

(Emphasis added).

Defense counsel argued that nothing in RCW 9A.44.030(2) restricted the defense to beliefs based upon "declarations as to age" made directly to the defendant, and therefore age declarations made to the world in general over the internet qualified under the statute. Thus defense counsel argued

he should be permitted “to ask the question” about false representations as to age made on the internet:

[I]t says, “based upon declarations as to age to [sic]¹⁰ 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 (emphasis added).

At this point the trial judge ruled a second time, and his phraseology made it plain that he believed he had *already* ruled on this issue; he stated his belief that he “mostly” agreed with the State that the subject wasn’t relevant because there was no testimony or evidence that the defendant knew about the internet lie:

THE COURT: Thank you.

Well, I’m staying with my original decision. Besides agreeing, I’m going to say mostly – *I accepted the State’s argument earlier on that Exhibit “K,”* and I’ll just restate that I still believe that statute is clear that the reasonable – the defendant has to have a reasonable belief to rely on that declaration and I don’t – I’m going to call it the cart before the horse. I don’t know how you can rely on a declaration if – if there’s no testimony of any kind at this point that he even knew about it. And there’s no reference in time . . .

RP 3/30/10, at 150 (emphasis added).

Despite the fact that he believed that he had now ruled twice, the trial judge told the prosecutor that he was going to allow the prosecutor to make additional comment on the issue. *Id.* at 150. The trial judge then

¹⁰ The actual word in the statute is “by.”

ruled again that while he would allow cross-examination about statements R.M. made about her age directly to William Valdiviez or to his mother, he would not allow any cross-examination about Exhibit “K” – the video which was posted to the internet along with the false statement that the person posting it was 19 years old. *Id.* at 151.¹¹

In sum, it makes no sense for the State to argue on appeal that the defense failed to obtain a final ruling. The record demonstrates beyond dispute that the trial judge did make a “final ruling,” and he granted the prosecutor’s motion in limine to preclude any cross-examination about the internet lie.

b. A Defendant in a Criminal Case is Not Required to Make An “Offer of Proof” Before He Can Exercise His Right to Cross-Examine a Prosecution Witness. The Accused is Not Required to Demonstrate That He Knows That The Answer That the Witness Will Give To The Question That He Wishes to Ask Will be Favorable to Him.

The prosecution repeatedly asserts that the defense failed to lay a “foundation” for questioning on the subject of the YouTube internet posting. For example, the State argues that the trial judge properly precluded the cross-examination because the defense failed to demonstrate that R.M. alone was responsible for posting the YouTube video. The State argues that since the positing of the video appears to have been a collaborative act of two people -- R.M. *and* her friend (and prosecution witness) Caley Byers -- that it simply wasn’t relevant that their YouTube

¹¹ “Well, I am allowing the cross-examination to continue along this line of -- not “K” but the -- the line you were questioning regarding the age, that kind of thing.”

post contained the false representation that the person posting the video was 19 years of age:

Firstly, the posting does not clearly identify R.M. as being identical with the persona of Bella2234, Secondly, the name given for Bella2234 is “Becca and Caley,” suggesting that Bella2234 was not one individual person at all, but rather a collaborative joint effort.

Brief of Respondent, at 25.

The State never explains why the YouTube post would not be a proper subject of cross-examination if in fact *both* R.M. and Caley Byers jointly lied to the world about their ages. Since there was testimony at trial that neither one was 19 yet (RP 3/30/10, at 42, 49), it is indisputable that they were lying no matter who they meant to be referring to when they said the poster of the video was 19 years old.

At a later point in its brief, abandoning its concession that the posting and the false representation seemed to be a “collaborative” act, the State argues before he could question R.M. about the YouTube post the Appellant had to first demonstrate that R.M. was involved in the posting of the false age representation:

Had Valdiviez been able to establish that it was actually R.M. who posted her age as 19, with the motive to appear older than she really was, then this evidence might have been admissible during the defendant’s case-in-chief as evidence of motive, because it would have tended to show that R.M. would have had a motive to appear older than she really was, which would tend to bolster Defendant’s claims regarding her representations as to age.

Brief of Respondent, at 28 (emphasis added).

But this argument erroneously assumes that the accused in a criminal case has to be able to demonstrate that his proposed cross-examination questions will definitely elicit information helpful to the defense before he will be allowed to ask such questions. In fact, the Supreme Court *rejected* this erroneous assumption eighty years ago in *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

In *Alford* the defendant tried to ask the following question of a prosecution witness: “Where do you live, Mr. Bradley?” *Id.* at 689. The defendant suspected – but did not know – that the witness was currently “in the custody of the Federal authorities.” *Id.* The defense further suspected that the prosecution had promised to get the witness released from custody if he testified in a manner favorable to the government, and that if such a promise had been made, it undermined the credibility of the witness’ testimony. The trial judge refused to allow the defendant to pose that question. The Supreme Court held the refusal to permit the question to be asked on cross-examination was prejudicial error and specifically held that an accused is *not* required to show that he knows what answer a witness will make to a cross-examination question that has the potential to reveal relevant information about the witness:

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory, and ***the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.*** [Citations]. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, ***even though he is unable to state to the court what fact a reasonable cross-examination might develop.*** Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony

and his credibility to a test, without which the jury cannot fairly appraise them. [Citations]. *To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.*

Alford, 282 U.S. at 692 (emphasis added).

In the present case, had he been allowed to question her about it, it is quite possible that R.M. would have admitted that she was the one who posted the false representation that the person posting the video on YouTube was at least 19 years old. It is also possible that she might have testified that her friend Caley Byers was the person who actually typed that false information onto the internet posting, and that Byers did so with her knowledge, and that she knew that what Byers was saying was false since neither one of them was 19. And finally, it is possible that she would have testified that the false age representation was posted on YouTube by Caley Byers without R.M.'s knowledge, and that she did not even know that Caley Byers had posted the video on YouTube.

None of this matters. Had she admitted she played a part in posting a false age representation, that would have assisted the defense. Had she denied it and blamed everything on her friend Caley, that *also* would have helped the defense because the jury would have been unlikely to believe such testimony, given the fact that R.M. and Caley Byers made the video together and are both depicted in it. But even if R.M. had testified that she had no idea who posted their video on the internet, Valdiviez's Sixth Amendment right to cross examine R.M. was violated because "prejudice ensues from a denial of *the opportunity to* place the witness in his [or

her] proper setting and *put the weight of his testimony and his [or her] credibility to a test*, without which the jury cannot fairly appraise them.” *Alford*, 282 U.S. at 692 (emphasis added).

c. **The Civil Cases Cited By The Prosecution, About the Need For an Offer of Proof, Are Not On Point. The Sixth Amendment Right of Cross-Examination Does Not Even Apply to Civil Cases, and Most of The Cases Cited By the State Involve the Exclusion of Evidence That A Party Wanted to Elicit on Direct Examination from Its Own Witness.**

The prosecution cites a number of case which allegedly support its contention that in order to preserve his Confrontation Clause claim that he was denied his right of cross-examination, Valdiviez was required to make an offer of proof as to what the witness’ answer to his cross-examine question would be. But none of the cases cited by the State are on point.

The State cites a host of “offer of proof” cases. But they are all *civil* cases, where the Sixth Amendment right to cross-examine witnesses does not even apply.¹² An examination of these cases shows that most of them involve rulings prohibiting a party from eliciting testimony on *direct* examination from its own witness, and thus do not involve rulings regarding the scope of *cross*-examination. For example, the State cites to *Smith v. Seibly*, 72 Wn.2d 16, 431 P.2d 719 (1967), an assault action against a physician who performed a vasectomy. The plaintiff claimed

¹² See, e.g., *Tomlinson v. Bean*, 26 Wn.2d 354, 173 P.2d 972 (1946) (breach of contract action); *Cameron v. Boone*, 62 Wn.2d 420, 383 P.2d 277 (1963) (negligence action based on automobile collision); *Blood v. Allied Stores Corporation*, 62 Wn.2d 187, 381 P.2d 742 (1963) (personal injury action for injuries sustained while riding an escalator; plaintiff precluded from asking a particular question of her witness on direct); *Dakin v. Dakin*, 62 Wn.2d 687, 384 P.2d 369 (1963) (divorce action where there were no restrictions at all placed on husband/appellant, either on direct or cross-examination).

that the physician never told him that the operation would make him permanently unable to have children. The trial judge excluded testimony about the standard of care in the Clarkston area which the plaintiff wanted to elicit from a Richland psychiatrist. *Id.* at 18. After the trial judge sustained an objection to this testimony, the plaintiff failed to make any offer of proof and the Supreme Court held that there was a failure to preserve the claim for appeal. *Id.* Thus, the *Seibly* case does *not* involve any question of restrictions placed on cross-examination, and even if it had involved an issue regarding the scope of cross-examination, it is not even a criminal case to which the Sixth Amendment applies.¹³

In essence, the prosecution is forced to attempt to rely on civil cases because it is settled law under *Alford* that in a criminal case a defendant does *not* have to make any offer of proof. In a criminal case, “It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop.” *Alford*, 282 U.S. at 697. As long as the

¹³ Oddly, there is another issue discussed in *Seibly* which *does* involve the scope of cross-examination, and which provides some support for Appellant Valdiviez’s position. The trial judge *allowed* the defendant doctor to cross-examine the plaintiff on the subject of the plaintiff’s failure to make child support payments. The Court observed that the plaintiff had raised the issue of his great desire to have more children and the psychological damage caused by the vasectomy. Since the plaintiff “injected into the case the topic of his interest and concern with children,” and thereby “introduced the issue,” the Supreme Court held that the plaintiff “could not complain” about the fact that the trial judge allowed the defendant physician to cross-examine the plaintiff upon an act – failure to support the one child he had – because this act undermined the plaintiff’s credibility. *Id.* at 18-19. In the present case, despite the fact that the prosecution introduced the subject of what R.M. had previously said about her actual age on direct examination, contrary to *Seibly*, the trial judge refused to let Valdiviez question her on cross-examination about a false representation regarding her age that had been posted on the internet.

cross-examination question is within the scope of direct examination, the defendant does not have to show that he knows what the answer to a specific cross-examination inquiry will be.

d. The Few Criminal Cases Which The Prosecution Does Cite In Support of Its Contention that Defense Counsel Failed to Make An Adequate “Offer Of Proof” Do Not Involve The Preclusion of Questions on Cross-Examination.

The prosecution does cite three criminal cases in support of its argument that Valdiviez’s attorney failed to make an adequate offer of proof to preserve the Confrontation Clause issue. But none of these cases involve restrictions placed upon cross-examination of a prosecution witness.

The State cites to *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991). But that case involved a challenge on appeal to the trial court’s ruling that the defendant was prohibited from calling Janet Bogart *as a defense witness* at trial because the defendant failed to adequately disclose the substance of Bogart’s anticipated testimony in violation of the criminal discovery rule. *Id.* at 536. The State argued that Ray did not make an adequate offer of proof under ER 103(a)(2) to preserve the issue on appeal. *Id.* at 538. The Supreme Court held that even though defense counsel did not make an offer of proof, the trial prosecutor summarized the proposed testimony of the defense witness and the trial judge was made aware of the substance of witness Bogart’s testimony. *Id.* at 539. Ray’s conviction was reversed. *Id.* at 543. Upon reading the *Ray* opinion

it is evident that it has *nothing* to do with limits placed on the *cross-examination* of a *prosecution witness* by an accused defendant.

The State also purports to rely upon *State v. Lubers*, 81 Wn. App. 614, 915 P.2d 1157 (1996), *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982), and *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984), as support for its contention that Valdiviez was required to make an offer of proof as to what his proposed cross-examination question would show. But none of these cases involve restrictions placed on the scope of a criminal defendant's cross-examination of a prosecution witness. *Lubers* involved a ruling prohibiting the defendant from asking a defense witness, Juanita Black, about alleged incidents of misconduct committed by relatives of the key prosecution witness against Black. *Lubers*, 81 Wn. App. at 618. *Saltarelli*, a prosecution for the rape of one woman involved the improper admission of evidence of the defendant's prior attempted rape of a different woman, which the prosecution presented allegedly to show motive or intent to commit rape under ER 404(b). The defendant's conviction was reversed because the prosecution's evidence should have been excluded. *Saltarelli*, 98 Wn.2d at 367. Similarly, the *Jackson* decision holds that ER 404(b) evidence presented by the State, regarding an uncharged bad act committed by the defendant, was erroneously admitted, and that it was harmless error. *Jackson*, 102 Wn.2d at 694. No claim regarding the scope of the defendant's cross-examination of any State witness was litigated in *Jackson*. In sum, none of these criminal cases support the State's contention that an offer of proof must be made to

preserve a claim that the trial court improperly restricted the scope of the cross-examination which the defendant wished to conduct.

e. **Valdiviez Had A Constitutional Right to Cross-Examine R.M. on the Subject of Lying About Her Age on The Internet In Order to Impeach Her Trial Testimony That She Never Told Either Valdiviez or His Mother That She Was Turning 16.**

The record demonstrates that the trial judge did not appreciate the difference between use of the internet lie for substantive purposes and for impeachment purposes. On appeal, the prosecution notes this distinction, and recognizes no less than four different legal theories under which the subject could be inquired into on cross-examination:

The information contained in the semi-anonymous YouTube posting . . . was not admissible, under any of the following four legal theories:

Theory 1: as substantive evidence tending to prove Defendant's affirmative defense that he reasonably believed R.M. to be 16 years old . . .

Theory 2: for impeachment purposes as a prior inconsistent statement under ER 801(1) . . .

Theory 3: for impeachment purposes by contradiction . . .

Theory 4: for purposes of attacking witness credibility, *in the discretion of the court*, pursuant to ER 608(b), as evidence of specific instances of the witness' conduct, probative of truthfulness or untruthfulness.

Brief of Respondent/Cross Appellant, at 19 (italics in original).

Despite the fact that the prosecution acknowledges the existence of three separate types of impeachment through cross-examination, it argues that Valdiviez is precluded from arguing that he was entitled to cross-examine R.M. about the internet lie for impeachment purposes. The State

claims that Valdiviez's trial lawyer never apprised the trial judge that the subject of the proposed cross-examination was relevant for impeachment purposes. *Brief of Respondent*, at 22. According to the State, Valdiviez never told the trial judge that the cross-examination he wished to conduct was for the purpose of attacking her credibility, and never explained that the question he wanted to ask R.M. was "actually probative of truthfulness or untruthfulness." *Id.*

f. Defense Counsel Specifically Apprised the Trial Judge That He Wanted to Ask R.M. About Her Internet Lie In Order to Show That She Had Made Inconsistent Statements About Her Age.

It simply isn't tenable for the State to argue that defense counsel failed to apprise the trial judge that one of the reasons that he wanted to question R.M. about her internet lie was to impeach her. The record unequivocally shows that defense counsel specifically argued that her false representation as to her age which she posted on the internet "would be characterized accurately as prior inconsistent statements" on the issue of her true age. RP 3/30/10, at 149. "A defendant's right to impeach a prosecution witness with evidence of ... a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses." *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). *Accord State v. Dickenson*, 48 Wn. App. 457, 469, 740 P.2d 312 (1987).

Confrontation of a witness with a prior inconsistent statement has been recognized for centuries as a classic form of impeachment. Abundant Washington case law acknowledges that it is proper to use prior inconsistent statements to impeach a witness, and thus to show that the

witness is not credible. *See, e.g., State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999) (“the purpose” of confronting a witness with prior inconsistent statements “is to allow an adverse party to show that the witness tells different stories at different times”); *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995) (“A trial witness’ own prior inconsistent statement is not offered to prove the truth of the matter asserted to the extent it is offered to cast doubt on the witness’ credibility”). It is well established that prior inconsistent statements are admissible for the purpose of attacking a witness’ credibility. 5A K. Tegland, *Evidence: Washington Practice* §613.3 (1999). When a prior statement has been compared with, and found to be different from, a statement made by a witness at trial, it is a prior inconsistent statement. *Williams*, 79 Wn. App. at 26. “This comparison, without regard to the truth of either statement, tends to cast doubt on the witness’ credibility, for a person who speaks inconsistently is thought to be less credible than a person who does not.” *Id.*, citing *McCormick on Evidence* § 34, at 114 (4th ed. 1992)).

On the day she testified, R.M. said she was 16 years old and that Caley Byers was 17 years old. RP 3/30/10, at 42, 47. The internet post associated with the YouTube video stated that “Becca and Caley” were 19. Exhibit K. The internet message was posted before the trial occurred. *See Exhibit K*. Therefore, the internet statement was a prior inconsistent statement, and Valdiviez had a constitutional right to cross-examine R.M. as to why she made these inconsistent statements.

g. The Trial Judge Properly Rejected The State's Contention That The Proposed Cross Examination Was Beyond the Scope of Direct.

The State continues to assert, as it did in the trial court, that the proposed cross-examination of R.M. would have exceeded the scope of the State's direct examination of her. *Brief of Respondent*, at 18. In support of this argument, the State asserts:

Here defense counsel sought to explore the YouTube posting during cross-examination, *when the State never questioned R.M. on direct, as to things she had said or had not said to William with regard to her age.*

Brief of Respondent, at 13 (emphasis added). But the contention that the State "never questioned R.M." about these subjects on direct is simply inaccurate. The record shows that the following questions were asked of R.M. on direct examination:

Q. Okay. *So did William know that you were – that it was going to be your 15th 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.

RP 3/30/10, at 55 (emphasis added).¹⁴

¹⁴ Later, when he testified, William Valdiviez denied that he said this to her. Instead of him saying to her that she was "going to be able" to get a learner's permit, Valdiviez testified that she told him "that she had a permit" and that she already had some experience driving, thus leading him "to believe that it was going to be her 16th birthday." RP 3/31/10, at 76.

Thus, the record shows that on direct examination the State opened up the entire subject of what William Valdiviez knew about her age. The prosecutor did not limit his inquiry to: (1) “What did you tell him about your age that day?” or (2) “What have you ever told him about your age?” or (3) “What did your relatives say in William’s presence about your age?” The question actually asked was much broader. The question was “[D]id William know . . . that it was going to be your 15th birthday?” Given the way the question was phrased, defense counsel could have objected on grounds of lack of personal knowledge, since the question asked R.M. to describe William Valdiviez’s state of mind by asking *her* what *he* “knew.” But defense counsel did not object and the question was answered. Thus, the subject developed on direct was simply: What did William Valdiviez know about her age?

When the parties argued about the whether the trial judge should grant the prosecution’s motion in limine, the prosecutor argued that he had not opened up the general subject of what did William know about her age. Defense counsel disputed that assertion and argued that the prosecutor had done exactly that:

MR. HESTER: What I guess I would be concerned about is I think 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.

If, depending upon her answers – you know, I guess I can – what I guess I would suggest is I – if I believe that through her cross-examination I've laid sufficient foundation her testimony has made this document relevant, I would tell the Court by a sidebar that that's where I think I'm at.

RP 3/30/10, at 112.

The trial judge then said on the record that he *agreed with defense counsel* that this subject *had* been addressed on direct and that he would simply “wait and see” and then make a ruling when the issue actually arose in the course of the defense cross-examination of R.M.:

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 112-13 (emphasis added).

Recognizing that the trial judge had just *rejected* his objection that questioning on R.M.'s age misrepresentations made elsewhere were “beyond the scope of direct,” the prosecutor sought leave to make further argument and the trial judge allowed him to do that. RP 3/30/10, at 113. The prosecutor then reasserted his contention that defense counsel proposed questioning was beyond the scope of the topic that the prosecutor had raised:

MR. BUSTAMANTE: My question to her was did William know how old she was. She said yes. And then I said, “What makes you say this?” And then she went into the details of the things that she knew like statements he made about her turning – about to turn 15. *So to be in – within the scope of direct, it seems to me Mr. Hester can only ask her about what conversation she had with William*

at the time regarding her age and representations that she made or his knowledge of her age.

THE COURT: Well, I don't think you're both really on that separate of a page.

MR. BUSTAMANTE: I – never asked her, “What did you tell William how old you are?” [Sic]. *I asked her what was William's knowledge about her age and where did it come from and how did – and how did she know about it.*

THE COURT: Okay. Well, I think the actual answer lies somewhere in between.

RP 3/30/10, at 113 (emphasis added).

The record demonstrates that the prosecutor's “beyond the scope” argument is clearly internally illogical. He acknowledged that he asked R.M. questions about William Valdiviez's knowledge of her age and those direct examination questions were *not* limited to knowledge that Valdiviez gained “at the time” he was interacting with R.M. on Christmas Eve of 2008. And yet the prosecutor contended that defense counsel's cross-examination questions should be limited to knowledge of R.M.'s age that the defendant acquired from conversation he had with R.M. “at the time.” Since the State's questions were *not* limited to any particular time frame (or to any particular place), there is no basis for the prosecution to argue that defense counsel's intended questions were “beyond the scope” of direct because they referred to some other time.

The trial judge responded to the prosecutor's renewed argument by declining (a second time) to sustain the prosecutor's “beyond the scope” objection, by reserving ruling on the motion and limine, and by stating that

he was going to “handle the objections on cross as I would any other cross and I’ll cover those as we get to them.” RP 3/30/10, at 114.

In sum, the trial judge rejected the prosecutor’s “beyond the scope” objection, although he later granted the prosecutor’s motion in limine on other grounds. While it is true that a trial judge’s ruling may be sustained on any ground which is supported by the record below, the trial judge’s ruling in this case is *not* supported by the trial court record. Accordingly, this Court cannot uphold the ruling limiting the defendant’s cross-examination in this alternate ground.

h. There Is No Requirement That Requires Trial Counsel to Cite to a Specific Rule of Evidence In Order to Preserve an Argument for Appeal.

The State notes that Valdiviez’ trial counsel “never articulated in any clear way that he intended to use [the YouTube post] as ER 608(b) evidence offered to attack the complaining witness’ credibility.” *Brief of Respondent*, at 13. To the extent that the State is maintaining that trial counsel never specifically cited to ER 608(b), that is correct. But the conclusion the State mistakenly draws from this is that on appeal Valdiviez is precluded from arguing that under this Evidence Rule, as well as under the Constitution, he was entitled to cross-examine about the YouTube post. Significantly, the State cites no authority for the proposition that failure to cite to specific legal authority *in the trial court* precludes a litigant from citing to that authority on appeal, and there is no

such authority.¹⁵ In fact, new legal authority can be cited *for the first time on appeal*. Indeed, RAP 10.8 specifically recognizes that new legal authority can even be cited after oral argument has been held, so long as no appellate court decision has yet been filed.

i. The False Representation As To Age Made on The Internet Post Was Obviously Germane to a Central Issue In the Case.

The *only* disputed issue for the jury to decide in connection with the charge of Rape of a Child 3 was whether Valdiviez reasonably believed that R.M. was 16 years old on the night in question. He testified she told him: “Hey it’s my 16th birthday.” RP 3/31/10, at 73.¹⁶ She testified she never said any such thing. RP 3/31/10, at 102. Thus her credibility on this issue was critical. Valdiviez said she wanted him to let her drive his truck on the beach that night. RP 3/31/10, at 73;¹⁷ *Id.* at 75;¹⁸ *Id.* at 76.¹⁹ It isn’t legal to drive in Washington unless one is 16 years of age. Thus,

¹⁵ On appeal, however, RAP 10.3(a)(6) requires that the Brief of Appellant contain “citations to legal authority.” An argument made in an appellant’s brief which is not supported by any legal authority at all, need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. App. 801, 809, 828 P.2d 549 (1992).

¹⁶ See also RP 3/31/10, at 72: “I had been drinking, my inhibitions were down, and she told me that she was 16.”

¹⁷ “We had celebrated at the stroke of midnight and that she was now 16 and she wanted to drive on the beach and I told her no.”

¹⁸ “You know, she basically was like, ‘Hey, you know tonight’s going to be my birthday and I’d like to drive.’ . . . She just said that tonight is going to be her birthday and that she would like to drive later. Because, you know, in Texas, we can drive on the beach and, as far as I know, this location is one of the only locations that you can actually drive on the beach and that’s – you know, that’s kind of a big deal in some people’s eyes. I find it to be fun.”

¹⁹ “Q. What statements did you perceive her to make and -- about -- and I’m asking about those statements as they relate to driving after midnight? A. Just the fact that she was turning 16 at midnight and that she wanted to drive.”

R.M. had a motive to lie about her age in order to get to do something she wanted to do.

On the internet, people are often asked to assert that they have reached a certain age. For example, often one cannot buy a product, or view pornography, unless one first makes a representation that one is of a certain age. YouTube requires a representation that a person is at least 18 before they can post something on the internet on the YouTube site. Thus, R.M. had a motive to lie to YouTube about her age. If she wanted to get her video posted, she had to lie about her age. The parallel between the YouTube lie, and the lie which William Valdiviez maintains R.M. told him, is exact. It is beyond dispute that the YouTube lie is probative of R.M.'s truthfulness. Even if the posting was just a collaborative effort of both R.M. and Caley Byers, since *neither* of them was 19 at the time, the posted assertion of age was a lie no matter who it was intended to refer to.

The prosecution attempts to rely on those cases which hold that a trial judge has discretion to refuse to allow cross-examination about a specific instance of misconduct if he reasonably concludes that the act of misconduct is not "germane or relevant to the issues presented at trial." *State v. O'Connor*, 155 Wn.2d 335, 119 P.3d 806 (2005). Thus, in *O'Connor*, the trial court concluded that whether the alleged victim of a tire slashing unfairly received more from her insurance company than she should have received was not germane to the disputed issue at trial of whether the defendant was the person who slashed her tires.

But cases like *O'Connor* are obviously distinguishable from the present case for two reasons. First, and most importantly, the trial judge never ruled that lies told by R.M. about her age were “not germane” to any of the issues presented at trial. As to the *substantive affirmative defense* of whether the defendant had a reasonable belief, based on R.M.’s declarations as to age, that she was 16, the trial judge said the internet lie did not matter without proof that Valdiviez saw that false statement on the internet. But the trial judge *never said* that the internet lie was not germane to *the credibility of R.M.* She testified that she did *not* tell Valdiviez that she was turning 16 that night. Valdiviez said she did tell him that. It is obviously germane to the issue of whether her testimony on this point was credible that she previously lied on the internet when she said she was 19. The trial judge never ruled that this lie was not germane to her credibility, and thus the preclusion of cross-examination on this subject cannot be sustained on this basis.

Second, if the trial judge *had* said something like that, then such a ruling *would* be an abuse of discretion on the facts in this case, particularly where Valdiviez (unlike *O'Connor*) did not have “other avenues for challenging [the alleged victim’s credibility].” *O'Connor*, 155 Wn.2d at 351.²⁰

²⁰ The alleged victim in *O'Connor* “was cross-examined regarding inconsistencies between her statements to the responding police officer and the investigating detective. [Citation omitted]. The defense also emphasized the fact that she did not see *O'Connor* slash the tires.” In the present case, Valdiviez had no other way of impeaching R.M. There were no other inconsistent statements she had made that he was able to bring to the jury’s attention. The issue was not “did he do it” as it was in *O'Connor*, where the victim did not see if he did it. Here it was admitted that “he did it” (had sex with her), and the

j. **Restrictions on a Criminal Defendant's Cross-Examination May Be Raised for The First Time on Appeal As Manifest Constitutional Error Where the Restriction Is Erroneous and Has Practical and Identifiable Consequences.**

With respect to the limitation placed on his cross-examination of R.M., the State repeatedly argues that Valdiviez “did not preserve the issue on appeal,” contending inter alia that he failed that to “mak[e] a satisfactory offer of proof” and that he failed to “request[] a final ruling on the matter at the proper time during the trial.” *Brief of Respondent*, at 20. In the preceding sections of this brief, Valdiviez has identified the many defects in these arguments, noting that Valdiviez’ trial attorney *did* object to the State’s request for a ruling limiting his cross-examination, and that an offer of proof as to what answer a cross-examination question is going to produce is not required. But ultimately, all the prosecution’s procedural objections are beside the point. *Even if* defense counsel had done absolutely *nothing*, Valdiviez would *still* be entitled to raise the issue for the first time on appeal because it is of constitutional magnitude and the trial judge’s ruling had practical and identifiable consequences adverse to Valdiviez.

The clearest example of this point is *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997). In that case, when hearsay statements from the alleged child victim of a sex crime were admitted into evidence and the

only issue was what he thought about her age based on what she had said to him. Since he was precluded from attacking R.M.’s credibility when she denied telling him she had just turned 16, there was no other basis for impeachment on the issue of what she told him about her age.

defendant made no objection at all. Although the alleged child victim took the witness stand, she was not asked about the act of sexual abuse which the defendant allegedly perpetrated against her, and therefore the defendant was completely unable to cross-examine her about that allegation. Despite the fact that the defendant's trial attorney made no objection in the trial court, the Supreme Court flatly rejected the State's contention that the issue could not be raised on appeal. The Court expressly held that he *was* permitted to raise the issue on appeal because denial of the opportunity to cross-examine the child was clearly an issue of constitutional magnitude:

The State also contends Rohrich should not have been permitted to argue inadmissibility of the child hearsay on appeal because he failed to object at trial. As the Court of Appeals correctly noted, the issue goes to the heart of Rohrich's right of confrontation and thus is a manifest error affecting a constitutional right which Rohrich may raise for the first time on appeal.

State v. Rohrich, 132 Wn.2d at 476 n. 7. *Accord State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007);²¹ *State v. Price*, 158 Wn.2d 630, 638 n. 3, 146 P.3d 1183 (2006).²² Thus, even assuming *arguendo* that

²¹ "Kronich's claim regarding the admission of the DOL certification at his trial is unquestionably constitutional in nature, as it is grounded in his rights under the Confrontation Clause. His claim of error may also be deemed manifest in that, had he successfully raised his Confrontation Clause challenge at trial, the DOL certification would have been excluded. Consequently, the State's case against Kronich for DWLS would have been fatally undermined. [Citation omitted] In other words, assuming there was an error, it clearly had "practical and identifiable consequences in the trial of the case." [Citation]. In accordance with the above analysis, we hold that Kronich's Confrontation Clause claim involves a manifest error affecting a constitutional right and is, thus, subject to review despite his failure to properly preserve the issue at trial."

²² "We note that Price did not object or move to strike . . . Even so the alleged error here implicates a question of constitutional magnitude, and if the asserted error had practical or identifiable consequences, then it was manifest, satisfying RAP 2.5(a)."

Valdiviez's trial attorney should have done something more than he did when he argued against the State's motion in limine, Valdiviez is still entitled to appellate review of this issue because his inability to cross examine R.M. on the subject of her prior false statement about her age "goes to the heart of [his] right of confrontation and thus is a manifest error affecting a constitutional right which [he] may raise for the first time on appeal." *Rohrich*, 132 Wn.2d at 476 n. 7.

2. SINCE THERE WAS NO EVIDENCE THAT APPELLANT VALDIVIEZ HAD ANY LEGAL ABILITY TO EXCLUDE ANYONE FROM THE HOTEL ROOM IN QUESTION, THE EVIDENCE WAS NOT SUFFICIENT TO PROVE THE CRIME OF FURNISHING ALCOHOL TO A MINOR BY THE ALTERNATIVE MEANS OF PERMITTING A MINOR TO CONSUME ALCOHOL ON "PREMISES UNDER HIS OR HER CONTROL."

a. The State Ignores The Legal Question of What Is The Meaning of the Statutory Phrase: "Under His or Her Control".

Appellant Valdiviez has raised the claim that the evidence produced at trial was legally insufficient to prove one of the two alternative means of committing the offense of Furnishing Alcohol to a Minor. In order to decide the question of whether there is sufficient evidence to uphold a conviction for allowing a minor to consume alcohol "on premises under his or her control," RCW 66.44.170, a court must first decide what the phrase "under his or her control" means.

Valdiviez has asserted that the word "control" refers to the *legal* authority to control who can be on the premises in question. He supported his argument with citations to cases which construe the phrase "under his or her control" in a liquor related context to mean the legal authority to

exclude people from the premises. On pages 39-46 of his opening brief Valdiviez discussed three cases which support his contention that “control” means the legal authority to exclude people from the premises: *S & S Market v. Washington State Liquor Control Board*, 65 Wn. App. 517, 828 P.2d 1154 (1992); *Houck v. University of Washington*, 60 Wn. App. 189, 803 P.2d 47 (1991); and *Baynes v. Rustler’s Gulch Syndicate*, 142 Wn. App. 335, 173 P.3d 1000 (2007).

b. It is Irrelevant That The Evidence Was Sufficient To Permit a Juror To Conclude That The Room Where the Alcohol Was Consumed was The Room Where The Defendant Slept and Where He Kept His Things. The Question is Not Whether It Was “His Room.” The Question Is Whether The Word “Control” Means The Legal Ability to Exclude People From The Premises.

The State simply ignores all of these cases, and pretends that there is no statutory construction issue at all. The State blithely asserts that the statutory phrase “premises under his or her control” includes a hotel room that the defendant has the physical ability to enter because he has a key to it. *Brief of Respondent*, at 38. Since the defendant had the physical ability to store things in the hotel room, including the alcohol that R.M. consumed, the State contends that there was evidence that the hotel room was “his room.”

A reasonable juror could infer that the place where a person feels at home making breakfast is “his premises” for purposes of satisfying RCW 66.44.270. The Defendant had the key to the hotel room. *Id.* at 157. The fact that William had a key to the room, in and of itself, is evidence that *it was his room*.

Brief of Respondent, at 39 (emphasis added).

Appellant Valdiviez does not contest this assertion. The evidence certainly is sufficient for a juror to conclude it was “his room,” that he kept his gun and his keys in it, that he slept in it, and that he had the ability to enter it. *Id.* at 37-39. But all of that begs the question. The statute and the jury instructions did not say that a conviction could be premised upon proof beyond a reasonable doubt that it was the room Valdiviez slept in, or the room he kept his alcohol in. The question to be answered is, “What does the phrase ‘under his or her control’ mean?” The State ignores this legal question.

The State makes the irrelevant argument that there was evidence that Valdiviez exercised “dominion and control” over the hotel room. This phrase generally is associated with criminal cases where one of the elements of the crime charged is possession. Constructive possession is defined in terms of dominion and control over the premises where specific articles, such as contraband, are found. *See, e.g., State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (possession of cocaine). But Valdiviez is not charged with the unlawful possession of anything. He is charged with permitting an activity on “premises under his control.”

Appellant stands upon the argument he made previously in his opening brief, that to prove “control” of the premises, there must be proof that Valdiviez had the *legal* authority to exclude people from the hotel room. There was no such evidence; accordingly under *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994), the conviction for Furnishing Alcohol to a Minor must be reversed.

C. ARGUMENT IN RESPONSE TO ISSUES RAISED IN THE STATE'S CROSS-APPEAL

1. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN LIMITING THE NUMBER OF TIMES THE PROSECUTION COULD MENTION THE FACT THAT R.M. WAS THE DEFENDANT'S COUSIN

The defense moved in limine for an order precluding the State's witnesses from referring to R.M. as Valdiviez's cousin. CP 120. Defense counsel noted that although sexual intercourse between cousins is not illegal, the jurors might well react with disgust to disclosure of the fact that the defendant and R.M. were relatives. CP 120. Because the cousin relationship was irrelevant to the charge, defense counsel argued that it was unfairly prejudicial and sought exclusion of this fact pursuant to ER 403. CP 121; RP 3/26/10, at 22-23. The trial judge asked counsel to think about whether an instruction telling the jury that it was not to consider the fact that they were cousins would solve the problem. *Id.* at 24. But the trial judge acknowledged that he could see defense counsel's point about unfair prejudice:

THE COURT: I can see your point too, Mr. Hester. I mean, you know, they're going to go, ah, incest, or they could very well, man, that's – boy, that's ugly, and no matter what I say for a curative instruction, they're going to be thinking, boy, he had sex with his cousin instead of in fact did a rape occur.

Id. at 24-25.

The prosecution argued that the cousin relationship was probative on the issue of delay in reporting. The State noted that R.M. did not report the rape to any member of her family while they were on vacation in Washington State, and waited until she had returned to her home in Texas

to report it. CP 128-29; RP 3/26/10, at 22.²³ According to the prosecution it was important that the jury know that R.M. and Valdiviez were cousins, because that would “help a jury to understand why R.M. waited before reporting the incident to authorities and before seeking medical attention.” CP 129.

The trial judge took the matter under advisement. Two days later the trial judge made the following written ruling:

The State may mention one time in opening and closing the word “cousin.” The Court will consider a cautionary instruction prior to counsel’s opening remarks instructing the jury that the cousin relationship between the defendant and R.M. (court will use first and last name in instruction) is not at issue in this trial and the jury should consider this relationship only for the purpose of background information of R.M. The State may only solicit the “cousin” response one time from R.M. and R.M. nor any other witness is to use the word “cousin”, subject to possible cross exam of Defendant in the event Defendant testifies and uses the word “cousin”.

CP 144-45.

Under ER 403, “[t]he trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact.” *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The trial judge’s determination “will not be reversed on appeal absent an abuse of discretion.” *Id*; *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994) The prosecution initially claimed that the cousin relationship was

²³ “[I]t would be very misleading to take the cousin relationship out of the story because this whole thing was a family gathering and the whole reason that the victim didn’t report it right away is because she didn’t know how her family was going to react. She didn’t want to ruin everybody’s vacation . . . So it would be totally unfair to the State and misleading to the jury to remove the cousin relationship from the equation.”

important because it explained the delay in reporting. But delay in reporting, while potentially significant in a case where the defendant *denies* that there was ever any sexual contact with the victim, is utterly insignificant in a case like this one where the defendant takes the stand and admits that he had sexual intercourse with the defendant. The defense also did not contest the fact that R.M.'s actual age on the date intercourse occurred was 15 years old. Thus, the defendant admitted all the elements of the crime charged, and the only disputed issue was whether he had an objectively reasonable belief that R.M. was 16 years old. Under these circumstances, the fact that there was a delay in reporting is completely insignificant. Thus, the evidence of the cousin relationship had essentially no probative value whatsoever. And on the other side of the coin, the unfair prejudicial impact of the evidence is obvious.

The trial judge did *not* completely forbid the prosecution from presenting testimony that R.M. and Valdiviez were cousins. Moreover, he left the door open to cross-examining Valdiviez on this subject if Valdiviez took the stand, testified, and used the word cousin. CP 144-145. This, in fact, occurred. Valdiviez did take the stand, and when asked what he later felt badly about, he testified that he “did feel badly” when he found out her real age was 15, and “[n]ot only that, the fact that I’m related to this person. She’s my cousin.” RP 3/31/10, at 85. And the prosecution *did* cross-examine Valdiviez about this. The prosecutor specifically asked him: “You said that you felt bad because – or you felt it

was wrong because – because she was your cousin?” RP 3/31/10, at 90. Valdiviez answered simply: “Correct.” *Id.*

Under these circumstances, the trial judge clearly did not abuse his discretion.

2. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN RULING THAT NURSE KATHY MARTIN'S TESTIMONY WOULD NOT BE HELPFUL TO THE JURY.

At the outset of the trial the prosecution explained that it wanted to present the testimony of nurse Kathy Martin so she could give

“(1) an explanation of delayed disclosure (a.k.a. delayed reporting) and (2) the relative infrequency of clinical findings in sexual assault cases in general. There will be no testimony offered by Nurse Martin regarding R.M. in particular.

CP 129.

Defense counsel responded that there was no need to call Nurse Martin to testify about things like “delayed reporting” because the defense had not even raised that issue. RP 3/26/10, at 31. He noted that while it was common in child sex abuse cases for defense attorneys to raise that issue, in the present case R.M. *did* report the incident of sexual intercourse to her best friend Caley Byers within minutes after it occurred. *Id.* at 32. Thus, there was no basis for making any defense argument about delayed disclosure and he didn’t think he would be making such an argument.

The trial judge then asked the prosecutor if the question “about whether or not the nurse, let’s see, Nurse Kathy Martin, is basically premature?” *Id.* at 32. The prosecutor responded he ought to be able to anticipate a defense argument by calling Nurse Martin as the State’s first

witness. *Id.* at 33-34. According to the prosecutor, he should be able to present such expert testimony about delayed reporting regardless of what the defense was: “I don’t think that there’s any requirement that, you know, we link it to the facts of the case, you know, before she can testify.” *Id.* at 34.

The trial judge took the matter under advisement. *Id.*

Two days later the trial judge made the following comments in writing while continuing to reserve ruling on the issue of the admissibility of Nurse Martin’s testimony:

Nurse Martin may not testify in the State’s case-in-chief until she has been questioned outside the presence of the jury; the Court shall then decide whether to allow, limit, or not allow Ms. Martin’s testimony.

CP 145.

On March 29th Nurse Martin testified outside the presence of the jury. The purpose of the hearing was to give the State a chance to convince the trial judge that Martin was qualified to be an expert witness. At the conclusion of the hearing, the trial judge ruled that Martin did not have sufficient training to qualify as an expert on the subjects the State wanted her to testify about. The judge noted that Martin had only “about three weeks of training, plus three to five days, and not all of it was on delayed reporting.” RP 3/29/10, at 39. He also stated:

I don’t find that this witness has sufficient academia training to qualify as an expert on what I believe is more than just some – some generalized - - I think it’s a – it borders on a medical type of issue.

Id. at 39. He also found Martin did not have sufficient on the job experience to qualify as an expert on these subjects. *Id.* at 39-40.

Finally, the trial judge commented again that it did not seem as if delayed reporting was going to be an issue in the trial, but that if it became an issue the Court would give the State an opportunity to find a qualified expert on that issue, and to call such an expert as a rebuttal witness.

[W]hat I heard from you, Mr. Hester, and I wrote it down, is that ***you don't believe there's an issue of delayed reporting and I assumed that that's not going to be argued at trial as to why she delayed.*** All I'm saying is if you decide to argue that, I'm not going to block the State from acquiring an expert on rebuttal other than Ms. Martin if – and I will give the State time to do that if – and I'm not telling you what to do. ***I'm just saying I heard that statement that you don't believe there is a delay and I don't – so I don't anticipate it's going to be an issue.***

RP 3/29/10, at 40 (emphasis added).²⁴

The trial judge was correct; delayed reporting never became a trial issue. Neither did the absence of any medical findings that sexual intercourse had occurred. As noted above, the defendant *admitted* that he had sexual intercourse with R.M. In sum, the subjects about which the State had wanted Nurse Martin to testify about proved to be completely irrelevant to the outcome of this case.

On appeal the State argues that several cases have held that expert testimony about matters such as delayed reporting and the absence of

²⁴ See also RP 3/29/10, at 41: “So Mr. Bustamante, if for some reason you find a person that you believe is - -I know in your – you disagree with me—but in your opinion, analyzing what I just said, you think would be qualified and you might need that person for rebuttal, I’ll allow you to – to a reasonable amount of time, and you should be working on that right now if you actually think you’re going to go there. But I’m not going to allow it in the case-in-chief.”

clinical signs of sexual activity are subjects beyond the common knowledge of jurors and that therefore expert testimony about these subjects can be helpful to a jury.

But such testimony is not likely to be helpful to a jury that isn't being confronted with any argument about the significance of delayed reporting or the absence of clinical signs of sexual intercourse. Since it was *agreed* that sexual intercourse occurred, expert testimony on these subjects obviously would *not* have been helpful to the jury because it would not have been even minimally relevant. Relevant evidence is evidence which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable. ER 401. But whether or not R.M. delayed in reporting the incident was not of any consequence to the determination of this action. Similarly, whether or not the act of sexual intercourse left any clinical signs which could be found in a subsequent medical examination was not a fact of consequence to the determination of this action. What was of consequence was whether sexual intercourse occurred, not whether it left observable medical signs, and here it was admitted that sexual intercourse occurred. Since the testimony of the proffered "expert" witness was of no consequence to the determination of the case, it was not an abuse of discretion to exclude it.

Moreover, even assuming the evidence had some minimal probative value, ER 403 expressly recognizes that a trial judge has discretion to exclude evidence of minimal probative value on the ground that consideration of such evidence would be a "waste of time." ER 403. The

trial judge exercised that discretion here. At the same time he left the door open for the State to call a rebuttal expert to testify on these subjects if they ever became relevant to the trial of the case. But they never did. Accordingly, there was no abuse of discretion.

A trial judge has discretion when ruling on the qualifications of a person offered as an expert witness, and will not be overturned on appeal absent a manifest abuse of discretion. *State v. Perez*, 137 Wn. App. 97, 108, 151 P.3d 249 (2007). The court's exercise of discretion will not be reversed so long as the decision made regarding the expert's qualifications is "fairly debatable." *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). Here the trial judge ruled that a person with very limited experience and training with respect to the medical examination of children who were alleging recent sexual abuse was not qualified, because three weeks training in this area was not enough.

On the facts of this case, this was not an abuse of discretion.

Unless *both* rulings – she isn't qualified, and besides, the subject of her proffered testimony is not relevant in this particular case – were abuses of discretion, the State was not prejudiced by them. There was no error here.

**3. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION
IN RULING THAT THE VICTIM ADVOCATE COULD
NOT ESCORT R.M. INTO THE COURTROOM.**

The prosecution notes that a victim has a legal right to have an advocate *present* at all hearings in a criminal case. *Brief of Respondent*, at

47, citing RCW 7.69.030(10).²⁵ The trial judge did not prevent that. The trial judge did not exclude the advocate from any hearing. There is nothing in the record to indicate that anyone was ever prevented from attending any part of the trial or any pretrial hearing.

The only ruling that the trial judge appears to have made was his directive that the trial prosecutor, not the victim advocate, should be the person that R.M. entered the courtroom with. In its brief the prosecution fails to give a page citation as to where in the record the trial court's ruling appears. *Brief of Respondent*, at 16. But the State quotes the trial judge as having said to the trial prosecutor:

I want you to escort the witness in just in case the jury's present. I don't want the witness coming in with the advocate.

Brief of Respondent, at 16.

From this context it is obvious that all the judge was doing was making sure that there was no improper ex parte contact between the jurors and the witness, R.M. There is nothing improper about that.

The State offers no reason why R.M. needed to be escorted by the victim advocate instead of by the trial prosecutor. Moreover, the State

²⁵ This statute provides in pertinent part: "There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding: . . . (10) With respect to victims of violent and sex crimes, *to have a crime victim advocate* from a crime victim/witness program, or any other support person of the victim's choosing, *present* at any prosecutorial or defense interviews with the victim, and *at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case.* The role of the crime victim advocate is to provide emotional support to the crime victim." (Emphasis added).

acknowledges that it made no objection to the trial judge's directive. *Brief of Respondent*, at 16.²⁶

A trial judge has discretion to control the manner in which witnesses testify. ER 611(a).²⁷ That discretion was not abused here.

4. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN PRECLUDING ANY QUESTIONING OF VIVIAN SMITH ABOUT THE FACT THAT SHE HIRED AN ATTORNEY WHO HAD BEEN REPRESENTING HER SON, BUT WHO WAS NO LONGER REPRESENTING HIM.

Vivian Smith is the mother of William Valdiviez. At trial the prosecutor said he wanted to question her about the fact that she had hired an attorney to represent her son in this case: “[S]he said that she was instrumental in hiring Mr. Valdiviez’s prior attorney, Jack Hill.” RP 3/31/10, at 25. By the time trial was held, Hill was no longer representing Valdiviez; he had been replaced by attorney Lance Hester, and Smith played no role in hiring him. *Id.* at 25, 29. The prosecutor argued that eliciting the fact that Vivian Smith hired Valdiviez’s former lawyer – who was no longer working on the case – was relevant because it would show her bias:

²⁶ Since no objection was ever made, this Court can have no idea as to why the trial judge felt it was necessary to give this direction to the prosecutor. It is logical to assume, however, that the trial judge had already observed what was, or what might have appeared to be, improper ex parte communication between the victim advocate and members of the jury. Had the State made an objection, we would know why the trial judge took this action.

²⁷ “The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth,”

MR. BUSTAMANTE: The motion is that I would like to be able to cross-examine her about these because they go to her credibility and they also go to prove her interest or bias in the case?

THE COURT: well, maybe interest and bias but how does it show credibility? What is it that she wasn't credible about?

MR. BUSTAMANTE: That she's never come forward with this information before and she had no idea that it was relevant to the case she says until –

THE COURT: Oh.

MR. BUSTAMANTE: -- until yesterday and she's been this involved. She's talked to William about the case, she's talked to the attorney about the case, she's talked to Mr. Hester, and never did she – she was made aware that the fact that Becca was claiming she was 16 was important.

RP 3/31/10, at 26-27.

The trial judge confirmed that Vivian Smith had been placed on the defense witness list long ago, and attorney Hester informed the judge that the prosecutor had interviewed her by telephone a few weeks ago. RP 3/31/10, at 28. But the prosecutor claimed that only yesterday had she come forward with new information regarding statements she claimed R.M. had made about her age, and the trial judge responded by pointing out that there was a difference between eliciting testimony that she had only recently disclosed the information that R.M. made statements to the effect that she was turning 16, and eliciting the fact that she had hired an attorney to represent her son:

MR. BUSTAMANTE: she never came forward with this information to any member of the prosecuting Attorney's Office before yesterday or to law enforcement. And I think when you are impeaching someone's credibility, when they have some information that's valuable to the case and they don't come forward with it, you're allowed to point that out.

THE COURT: Well, there's a difference between that and saying did you talk to another attorney. I mean, I'm not going to let you go into what attorney she talked to, what attorney she hired.

MR. BUSTAMANTE: That shows bias and interest in the case also.

THE COURT: Well, you know, that's an interesting one. I've never, ever, ever been asked to – I suppose it could show bias. Yeah. I've never actually had to address that question before about who hired who.

What's your response to that, Mr. Hester, regarding a straightforward I assume short question?

MR. HESTER: She didn't hire me.

THE COURT: Oh,

MR. HESTER: She may – I don't know. I mean, she may have researched, you know, who is to hire. I don't know what went on there. But she didn't hire me, and it's no one's business who hired me.

THE COURT: No, I –

MR. HESTER: And I'm not –

THE COURT: No, I – no, I under –

MR. HESTER: -- being disrespectful to you. I'm just –

THE COURT: I understand that. I'm trying to get into the –

So if she – if she paid – if she hired some former attorney, why should I let that come in.

MR. BUSTAMANTE: Because that shows this is not just some neutral party. This is a person who's been actively assisting Mr. Valdiviez from an early date in this case and she has greater interest or bias than just somebody who hasn't gotten involved. And I think she said that, you know, she made the initial contact with this prior attorney, talked to him about, you know, coming to represent Mr. Valdiviez. It's not intended – certainly – I mean, everyone knows he's got a right to an attorney. We're not commenting on that. Just her bias, her interest in the case is greater than it would be otherwise had she not had that participation.

THE COURT: And Vivian Smith is the aunt? No. How's Vivian com –

MR. HESTER: The mother.

THE COURT: The mother, mother of your client. Okay. Well, you can certainly ask her questions about her relationship and that's her son.

What about the - *-what's your response to the State's request to ask – even if I were to allow only a general question. "Have you invested any of your own money in financing any part of Mr. . . ."*

MR. BUSTAMANTE: *I wouldn't ask that question.*

THE COURT: Oh, you're not.

MR. BUSTAMANTE: No.

THE COURT: *Oh, well, what are you asking then? I thought you wanted to ask her about her role as far as paying.*

MR. BUSTAMANTE: *Just she did have a role in getting him an attorney. That's all.* But she said she talked to William about the case. He said that there was a case but didn't give her specifics, and that she said she contacted an attorney in Tacoma.

THE COURT: Okay. Well, here's what – *I'm not going to let you ask her questions about contacting an attorney. I will let you ask her questions about,* you know, the typical – *she's the mother, you know,* those kinds of typical biases.

RP 3/31/10, at 28-31 (emphasis added).

In sum, the obvious bias that flows from being the *mother* of the defendant was something the prosecution was free to cross-examine Vivian Smith about. This fact was elicited on direct examination. The additional fact that she “did play a role in getting him an attorney” – an attorney who was no longer representing Valdiviez – is of virtually no relevance. The prosecutor claimed it showed her “interest” in her son's

case. But any mother is going to be interested in the outcome of a criminal prosecution brought against her son. The fact that she contacted an attorney adds little if, anything, to the obvious fact that mothers are interested in and biased in favor of their sons. Under ER 403 the trial judge has discretion to exclude evidence when the potential unfair prejudicial impact of the evidence, or the risk of juror confusion, outweighs whatever probative value it might have on a relevant issue. That discretion was exercised in this case and the State has failed to show that it was manifestly abused.

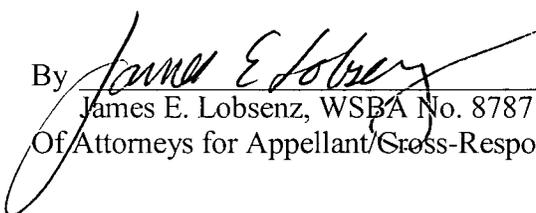
D. CONCLUSION

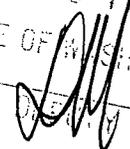
For the reasons stated above, appellant asks this Court to (1) reverse his conviction for Rape of a Child 3 and to remand that charge for a new trial; and (2) to reverse and remand his conviction for Furnishing Alcohol to a Minor and to remand that charge for retrial solely on the alternative means of actually providing alcohol to a minor.

DATED this 9th day of November 2011.

CARNEY BADLEY SPELLMAN, P.S.

By


James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant/Cross-Respondent

COURT OF APPEALS
DIVISION II
11 NOV 10 PM 2:20
STATE OF WASHINGTON
BY 

NO. 40789-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM N. VALDIVIEZ,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.
3. On November 10, 2011, I caused to be served a true and correct copy of the document listed below on the following:

CERTIFICATE OF SERVICE- 1

ORIGINAL

Counsel for the State:
David J. Burke
Pacific County Prosecuting Attorney
P.O. Box 45
South Bend, WA 98586-0045
dburke@co.pacific.wa.us
(Via Email and US First Class Mail)

Entitled exactly:

**CONSOLIDATED BRIEF OF CROSS-RESPONDENT AND REPLY
BRIEF OF APPELLANT**

DATED this 10th day of November, 2011



Lily T. Laemmle

CERTIFICATE OF SERVICE- 2

NO. 40789-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM N. VALDIVIEZ,

Appellant.

CERTIFICATE OF SERVICE
ON APPELLANT AND
APPELLANT'S PARENTS

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.
3. On November 10, 2011, I caused to be served a true and correct copy of the document listed below via e-mail and U.S. First Class Mail on the following:

CERTIFICATE OF SERVICE- 1

(CLIENT)

Mr. William Valdiviez
2008 Martin Luther King Jr Way S
Tacoma, WA 98504

(CLIENT'S PARENTS)

Mr. Robert Smith
Mrs. Vivian Smith
8806 Hearther Circle
Houston, Texas 77055

Entitled exactly:

**CONSOLIDATED BRIEF OF CROSS-RESPONDENT AND REPLY
BRIEF OF APPELLANT**

DATED this 10th day of November, 2011



Lily T. Laemmle

CERTIFICATE OF SERVICE- 2