

70021-9

70021-9

COA NO. 70021-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

L.R.,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JAN 31 PM 4:33

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

The Honorable Deborra E. Garrett, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE EVIDENCE IS INSUFFICIENT TO CONVICT L.R. OF VIOLATING RCW 66.44.270(2).....	1
b. <u>The Evidence Is Insufficient To Show Possession/Consumption Under RCW 66.44.270(2)(a)</u>	1
c. <u>The Evidence Is Insufficient To Show L.R. Exhibited The Effects Of Having Consumed Liquor In A Public Place Under RCW 66.44.270(2)(b)</u>	1
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Happy Bunch, LLC v. Grandview North, LLC,</u> 142 Wn. App. 81, 173 P.3d 959 (2007), <u>review denied</u> , 164 Wn.2d 1009, 195 P.3d 87 (2008)	5
<u>In re Dependency of C.R.B.,</u> 62 Wn. App. 608, 814 P.2d 1197 (1991).....	4
<u>In re Detention of Meistrell,</u> 47 Wn. App. 100, 733 P.2d 1004 (1987).....	3
<u>Leschi Improvement Council v. Wash. State Highway Comm'n,</u> 84 Wn.2d 271, 525 P.2d 774, 804 P.2d 1 (1974).....	4
<u>State v. Alvarez,</u> 74 Wn. App. 250, 872 P.2d 1123 (1994), <u>aff'd</u> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	5
<u>State v. Colquitt,</u> 133 Wn. App. 789, 137 P.3d 892 (2006).....	2
<u>State v. Drum,</u> 168 Wn.2d 23, 225 P.3d 237 (2010).....	6
<u>State v. Enlow,</u> 143 Wn. App. 463, 178 P.3d 366 (2008).....	2
<u>State v. Gaddy,</u> 152 Wn.2d 64, 93 P.3d 872 (2004).....	5
<u>State v. Gaines,</u> 122 Wn.2d 502, 859 P.2d 36 (1993).....	3, 6
<u>State v. Libero,</u> 168 Wn. App. 612, 277 P.3d 708 (2012).....	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Niedergang</u> , 43 Wn. App. 656, 719 P.2d 576 (1986).....	5
<u>State v. Solomon</u> , 114 Wn. App. 781, 60 P.3d 1215 (2002), <u>review denied</u> , 149 Wn.2d 1025 (2003)	5
<u>State v. Vasquez</u> , 109 Wn. App. 310, 34 P.3d 1255 (2001).....	4
<u>State v. Williams</u> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	3-5

RULES, STATUTES AND OTHER AUTHORITIES

RAP 10.3(g).....	5
RCW 66.44.270(2).....	1
RCW 66.44.270(2)(a)	1
RCW 66.44.270(2)(b).....	1, 3, 4, 6
RCW 66.44.270(2)(b)(i)	2, 3
RCW 66.44.270(2)(b)(ii)	1, 3

A. ARGUMENT IN REPLY

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

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

The State concedes the evidence is insufficient to convict L.R. under RCW 66.44.270(2)(a). Brief of Respondent (BOR) at 3.

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

The State maintains the evidence is sufficient to convict L.R. of being in a public place while exhibiting the effect of having consumed liquor under RCW 66.44.270(2)(b). BOR at 3-8. The State contends it can be inferred L.R. exhibited the effects of liquor while in a public place (while traveling home) because he exhibited the effects of liquor when he returned home. BOR at 7-8.

The record, however, is devoid of any description of L.R.'s "speech, manner, appearance, behavior, lack of coordination" or the like while he was in a public place. RCW 66.44.270(2)(b)(ii). The record also lacks any description that L.R. had the odor of liquor on his breath *and* was "in possession of or close proximity to a container that has or recently had liquor in it" while he was in a public place. RCW 66.44.270(2)(b)(i). The

State is entitled to reasonable inferences from the evidence. But in determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). It is speculation that L.R. exhibited the effects of alcohol while traveling from his friend's house to his home.

Citing finding of fact 4, the State asserts the court found L.R. "exhibited effects of intoxication while at his friend's house prior to traveling home." BOR at 6. In actuality, finding of fact 4 states that L.R.'s mother received a report that L.R. was intoxicated. CP 58 (FF 4). The court did not find L.R. was exhibiting the effects of that intoxication at the friend's house. There was no basis to make such a finding on the sparse record before the trial court. In any event, there is no dispute that the friend's house did not constitute a "public place" under RCW 66.44.270(2)(b).

Further, the court's findings of fact must support its conclusion of law that L.R. committed the crime. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). The court did not make a true finding of fact regarding things like L.R.'s speech, manner, appearance, behavior, or lack of coordination while he was transported home, nor did it make a true finding that L.R. had the odor of liquor on his breath *and* was "in possession of or close proximity to a container that has or recently had

liquor in it" while he was being transported home. RCW 66.44.270(2)(b)(i), (ii); see Brief of Appellant at 10-11.

The State nonetheless asserts the introductory portion of "finding of fact" 10 — "The following evidence indicated that [L.R.] was in a public place while intoxicated and exhibiting the effects of intoxicating liquor . . ." — shows the court found L.R. exhibited the effects of liquor while being transported from his friend's house. BOR at 4-5.

The State is mistaken. The language quoted above is in reality a conclusion of law. "Conclusions of law cannot be shielded from review by denominating them findings of fact." State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). "A conclusion of law that is erroneously denominated a finding of fact is reviewed as a conclusion of law." State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993). The quoted portion of finding 10 is in substance no different than its conclusion of law 2.d. that L.R. "was intoxicated, and exhibited the effects of such intoxication, in a public place." CP 60. And, of course, L.R. argues that conclusion of law is wrong because there is insufficient evidence to support conviction under RCW 66.44.270(2)(b). BOA at 11-12.

"The determination of whether particular statutory language applies to a factual situation is a conclusion of law and is fully reviewable by the appellate court." In re Detention of Meistrell, 47 Wn. App. 100,

107, 733 P.2d 1004 (1987). The particular statutory language at issue here is found at RCW 66.44.270(2)(b), which provides "It is unlawful for a person under the age of twenty-one years to be in a public place, or to be in a motor vehicle in a public place, while exhibiting the effects of having consumed liquor." The court's "finding" that "[t]he following evidence indicated that [L.R.] was in a public place while intoxicated and exhibiting the effects of intoxicating liquor . . ." parrots the statutory language of RCW 66.44.270(2)(b) and is in reality a conclusion of law. See, e.g., In re Dependency of C.R.B., 62 Wn. App. 608, 618-19, 814 P.2d 1197 (1991) (purported findings that parrot language of RCW 13.34.180 were actually legal conclusions).

Findings of fact 10(a) through (e) are true findings of fact. See Williams, 96 Wn.2d at 221 ("A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.") (quoting Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)); State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001) (findings of fact encompass the "who, what, when, and where" of a situation).

But the introductory language of finding 10 ("L.R. "was intoxicated, and exhibited the effects of such intoxication, in a public

place") is in actuality a legal conclusion drawn from facts 10(a) through (e). That language is a legal conclusion because it is a "determination . . . made by a process of legal reasoning from the facts," rather than "an assertion that evidence shows something occurred or exists, independent of an assertion of its legal effect." State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986); Williams, 96 Wn.2d at 221.

A de novo standard of review applies to the legal conclusion drawn by the trial court from the facts. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025 (2003). Similarly, whether the trial court's findings of fact support its conclusions of law is a question of law reviewed de novo. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); State v. Libero, 168 Wn. App. 612, 616, 277 P.3d 708 (2012). Further, "[w]here the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also de novo." Happy Bunch, LLC v. Grandview North, LLC, 142 Wn. App. 81, 88, 173 P.3d 959 (2007), review denied, 164 Wn.2d 1009, 195 P.3d 87 (2008).

Finally, RAP 10.3(g) does not require a party to assign error to a conclusion of law. State v. Alvarez, 74 Wn. App. 250, 255, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995). But L.R. took the extra step of assigning error to the conclusions of law anyway, including

conclusion 2.d. BOA at 1. The introductory language of finding 10 addressed above is redundant to conclusion 2.d. Again, a conclusion of law erroneously denominated a finding of fact is reviewed as a conclusion of law. Gaines, 122 Wn.2d at 508.

L.R.'s challenge is clear. He challenges the sufficiency of the evidence to support the conviction. Whether evidence is sufficient to support a conviction is an issue of law. State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010). The true facts found by the trial court do not support the conclusion of law that L.R. violated RCW 66.44.270(2)(b).

B. CONCLUSION

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

DATED this 31st day of January 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON

Respondent,

v.

LEEVI ROSSO,

Appellant.

)
)
)
)
)
)
)
)
)
)
)

COA NO. 70021-9-1

DECLARATION OF SERVICE

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

THAT ON THE 31ST DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE, SUITE 201
BELLINGHAM, WA 98227
Appellate_Division@co.whatcom.wa.us

- [X] LEEVI ROSSO
PARKE CREEK COMMUNITY
11042 PARK CREEK ROAD
ELLENSBURG, WA 98926

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY 2014.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 31 PM 4:34