

70021-9

70021-9

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 DEC 31 PM 2:10

No. 70021-9-1

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

STATE OF WASHINGTON, Respondent,

v.

LEEVI ALLEN ROSSO, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By NATHAN DEEN
Deputy Prosecutor
Attorney for Respondent
WSBA # 39673**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

ORIGINAL

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

1. Do the findings of fact establish sufficient evidence to support the trial court’s conclusion that the Appellant committed the crime of minor exhibiting the effects of alcohol in public beyond a reasonable doubt? 1

C. FACTS 1

D. ARGUMENT 2

1. The trial court’s findings of fact do not support an adjudication of guilt under RCW 66.44.270(2)(a)..... 2

2. The trial court’s findings of fact do support an adjudication of guilt under RCW 66.44.270(2)(b). 3

E. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

State v. A.M.,
163 Wash. App. 414, 260 P.3d 229 (2011)..... 4

State v. Delmarter,
94 Wash. 2d 634, 618 P.2d 99 (1980)..... 4

State v. Hosier,
157 Wash. 2d 1, 133 P.3d 936 (2006)..... 4, 8

State v. Smissaert,
41 Wash. App. 813, 815, 706 P.2d. 647, 649 (1985)..... 7

Statutes

RCW 66.44.270(2)(a) 2, 3

RCW 66.44.270(2)(b) 3, 5, 9

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1. Do the findings of fact establish sufficient evidence to support the trial court's conclusion that the Appellant committed the crime of minor exhibiting the effects of alcohol in public beyond a reasonable doubt?**

C. FACTS

Procedural.

The pertinent procedural facts are correctly recounted in Appellant's brief.

Substantive.

On June 12, 2012, at approximately 5:33 p.m., Appellant's mother, Elisa Rosso, called Bellingham Police and reported that Appellant had been consuming alcohol. CP 57-60 (FF 1). Appellant's birth date is April 4, 1995; on June 12, 2012, Appellant was seventeen years old. CP 57-60 (FF 7). Appellant called Bellingham Police at approximately 5:49 p.m. and requested a preliminary breath test ("PBT"). CP 57-60 (FF 2). The dispatcher believed Appellant sounded drunk. *Id.*

Bellingham Police Officer Shannon responded to Ms. Rosso's call and arrived at Appellant's and Ms. Rosso's residence of 2526 W.

Maplewood Avenue, Apartment 1 in Bellingham, Washington, Whatcom County at approximately 6:00 p.m. to investigate. CP 57-60 (FF 3). Upon Officer Shannon's arrival, Ms. Rosso reported that Appellant was at a friend's house earlier in the day and that the friend called to report Appellant was intoxicated and needed to leave. CP 57-60 (FF 4). Ms. Rosso further reported that Appellant arrived home just prior to police arriving. *Id.* Officer Shannon observed that Appellant had an overwhelming odor of intoxicants on his breath. CP 57-60 (FF 5). At 6:10 p.m., Appellant provided a PBT reading of .245 breath alcohol content. *Id.* In Officer Shannon's opinion, Appellant was obviously intoxicated. *Id.* Ms. Rosso was concerned for her son's safety due to his level of intoxication, so an ambulance was called to the scene. CP 57-60 (FF 6). The emergency medical professionals determined that due to Appellant's level of intoxication, he needed to be transported to the emergency room. *Id.*

D. ARGUMENT

- 1. The trial court's findings of fact do not support an adjudication of guilt under RCW 66.44.270(2)(a).**

For the reasons stated in Appellant's brief, the State concedes that there is insufficient evidence to adjudicate the Appellant guilty of minor in possession of alcohol under RCW 66.44.270(2)(a).

2. The trial court's findings of fact do support an adjudication of guilt under RCW 66.44.270(2)(b).

In order to adjudicate the Appellant guilty of minor exhibiting the effects of alcohol in public under RCW 66.44.270(2)(b), the State was required to prove that the Appellant was under the age of twenty-one while exhibiting the effects of having consumed liquor in a public place. RCW 66.44.270(2)(b). Appellant does not contest that he was not under the age of twenty-one nor does he contest that he was in a public place when he traveled from his friend's home to his own. Furthermore, Appellant does not contest that he was exhibiting the effects of having consumed liquor while at his home. Instead, his sole argument as to his adjudication under RCW 66.44.270(2)(b), is that the superior court's findings provide insufficient evidence to support its conclusion that Appellant was exhibiting the effects of having consumed liquor at the time he was in a public place.

“When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Hosier, 157 Wash. 2d 1, 8, 133 P.3d 936, 939 (2006)9 (2006) (citations omitted). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” State v. Delmarter, 94 Wash. 2d 634, 638, 618 P.2d 99, 101 (1980)101 (1980) (citation omitted). Furthermore, as Appellant correctly notes, “unchallenged findings are verities on appeal.” Appellant Brf. at 4 (citing State v. A.M., 163 Wash. App. 414, 419, 260 P.3d 229 (2011)2011)). Here, there is substantial circumstantial evidence that Appellant exhibited the effects of having consumed liquor in a public place.

Initially, it should be noted that Appellant is incorrect when he asserts that the trial court did not find that, while being transported from his friend’s house to his, Appellant had the odor of liquor on his breath and by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibited that he was under the influence of liquor. Appellant Br. at 10. The superior court’s finding of fact 10 clearly indicates such a finding. In finding of fact 10, the trial court states: “The following evidence indicated that [Appellant] was in a public place while intoxicated *and exhibiting the effects of intoxicating liquor . . .*” CP 57-60 (FF 10)

(italics added). Exhibiting the effects of having consumed liquor is defined in part as “a person [having] the odor of liquor on his or her breath and . . . by speech, manner, appearance, behavior, lack of coordination, or otherwise, exhibits that he or she is under the influence of liquor.” RCW 66.44.270(2)(b). In the superior court’s enumerated reasons for finding Appellant was exhibiting the effects of liquor in public, it cites the odor of liquor on his breath combined with his speech and manner, appearance, and behavior as observed by witnesses as reasons for its finding. CP 57-60 (FFT 10 (a)-(d)). Because Appellant is not challenging the superior court’s findings, Appellant Br. at 4, and they are therefore verities on appeal, his appeal on this basis should be denied.

Assuming *arguendo* Appellant is correct when he argues that the superior court’s findings of fact merely establish that Appellant exhibited the effects of alcohol at his home rather than en route to his home, the superior court’s findings still support its conclusions of law. As noted *supra*, Appellant does not challenge the superior court’s findings of fact. Rather, based on those facts, Appellant maintains there is insufficient evidence to conclude Appellant exhibited the effects of alcohol in public. This assertion is incorrect.

Aside from explicitly finding Appellant exhibited the effects of having consumed liquor in a public place, the superior court also found he was exhibiting the following effects at his home:

- 1) His speech, as observed by the police dispatcher, indicated he was intoxicated. CP 57-60 (FF 1).
- 2) Appellant has an overwhelming odor of intoxicating liquor on his breath. CP 57-60 (FF 5).
- 3) Based on their observation of Appellant and his manner, appearance, and behavior, Officer Shannon, Appellant's own mother, and emergency medical professionals all opined that he was intoxicated. CP 57-60 (FF 5, 6).

In addition, the court found Appellant exhibited effects of intoxication while at his friend's house prior to traveling home. CP 57-60 (FF 4).

It cannot be clearly established from the superior court's findings of fact the exact time at which Appellant arrived at his home. At 5:33 p.m. Appellant's mother called police to report he was consuming alcohol, but it is not clear whether he was in her presence at that time or if she was merely relaying information provided to her from Appellant's friend. At approximately 6:00 p.m., Appellant was at home when Officer Shannon contacted him. At that time, Appellant's mother reported that he "just" arrived home. Therefore, it is clear from the superior court's findings that

Appellant arrived home a short time before 6:00 p.m. At that time, he was highly intoxicated.¹ See CP 57-60 (FF 4-6).

From these facts, it was reasonable for the superior court to conclude that Appellant was in a public place when he exhibited the signs of consuming liquor. Prior to leaving his friend's house, he was intoxicated. Upon arriving home, he was extremely intoxicated. This is circumstantial evidence that Appellant was therefore exhibiting the effects of consuming liquor between the two locations. Even if only the evidence of consumption noted at Appellant's house is considered, there is still substantial circumstantial evidence that he was exhibiting the effects of liquor in public. While at his home, the effects of Appellant's liquor consumption – his speech, odor on intoxicants, manner and behavior – were so acute that hospitalization was required to treat him. It is reasonable for a fact finder to infer from this level of intoxication that minutes earlier when Appellant was in a public place, he was exhibiting similar effects.

Expert testimony or evidence is not required for a fact finder to conclude that a person extremely intoxicated from alcohol arrives at such a state over time. See *State v. Smissaert*, 41 Wash. App. 813, 815, 706 P.2d. 647, 649 (1985) (“Certainly the effects of alcohol upon people are

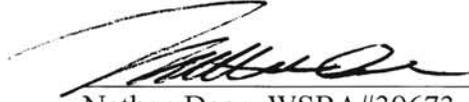
¹ The findings of fact also establish he was exhibiting speech consistent with intoxication at 5:49pm. FF2

commonly known and all persons can be presumed to draw reasonable inferences therefrom . . .”). It would also be within a fact finder’s common knowledge and experience that such intoxication does not dissipate in a short period of time. *Id.* Assuming *arguendo* that the only evidence the superior court relied upon here to conclude that Appellant was exhibiting the effects of liquor in public is the evidence of the effects noted at his home, such evidence is sufficient circumstantial evidence to reasonably infer that Appellant was exhibiting those same effects when he was in a public place a short time previously. Even if this Court would not come to such a conclusion based on the superior court’s findings of fact, where the sufficiency of the evidence is challenged, all reasonable inferences are to be made in favor of the State and the trial court’s reasonable inference here cannot be overturned on appeal. Hosier, 157 Wash. 2d at 8.

E. CONCLUSION

The State requests that this Court affirm the superior court’s adjudication of guilt for minor exhibiting the effects of consuming liquor in a public place under RCW 66.44.270(2)(b).

Respectfully submitted this 3rd day of December, 2013.



Nathan Deen, WSBA#39673
Deputy Prosecuting Attorney
Attorney for Respondent

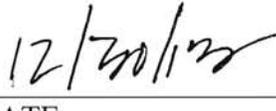
CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, CASEY GRANNIS, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122



NAME



DATE