

NO. 40789-2-II

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

STATE OF WASHINGTON,

Respondent/Cross-appellant

v.

WILLIAM NICOLAI VALDIVIEZ

Appellant/Cross-respondent

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY CLERK

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

The Honorable Michael J. Sullivan, Judge

RESPONDENT/CROSS-APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant William Valdiviez assigns error to the trial court's ruling prohibiting cross-examination on the subject of a YouTube posting allegedly created by the complaining witness, R.M.

2. Appellant William Valdiviez assigns error to the entry of a judgment of conviction for the offense of furnishing alcohol to a minor.

3. Cross-appellant, State of Washington, assigns error to the pretrial order limiting the State's use of the word "cousin" at trial and redacting said word from Deputy Paul Jacobson's testimony regarding the Defendant's statements to him, as well as to the inadequate remedy fashioned by the trial court after the Defendant testified regarding the same matter.

4. Cross-appellant, State of Washington, assigns error to the order prohibiting Kathleen Martin from offering testimony at trial regarding the phenomenon of delayed reporting and regarding the infrequency of clinical findings in post-sexual-assault examinations.

5. Cross-appellant, State of Washington assigns error to, the trial court's order directing the prosecutor not to allow the victim advocate to escort the victim into the courtroom when victim was called to testify.

6. Cross-appellant, State of Washington, assigns error to the trial court's order preventing the State from cross-examining defense witness

Vivien Smith, concerning the role she played in hiring an attorney for the defendant, for purposes of showing bias or interest and for purposes of attacking the credibility of her testimony, after she stated that she never talked to the Defendant about the case. RP 03/30/2010 at 29.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court abuse its discretion in preventing cross-examination of the complaining witness, during the State's case-in-chief, regarding information contained in a semi-anonymous YouTube profile and accompanying video, allegedly posted by the complaining witness, when such cross-examination went beyond the scope of direct examination, and where the defense offered said evidence for purposes of proving its affirmative defense, to wit, that the Defendant reasonably relied on the alleged victim's representations that she was 16 years of age?

2. Was there sufficient evidence to permit a rational trier of fact to conclude beyond a reasonable doubt that the premises were the Defendant's premises?

3. With regard to the issue of whether the trial court abused its discretion in preventing cross-examination of the complaining witness as to the YouTube posting, did the Defendant properly preserve the issue on appeal when he never made any offer-of-proof offering such evidence for impeachment purposes pursuant to ER 608(b), never conducted a *voir dire*

of the witness outside the presence of the jury to establish what her testimony would be, and never renewed his motion, or sought a final ruling from the court, after the State questioned R.M. about representations as to age during the rebuttal phase of the trial?

4. Did the trial court abuse its discretion in redacting the word "cousin" from the investigating officer's testimony when Defendant had previously stated to him that what he had done was wrong because the victim was his cousin and because she was only 15 years old?

5. After the Defendant testified that he had told the deputy sheriff that he knew that what he had done was wrong because the victim was his cousin, did the court abuse its discretion in refusing to allow the State to reveal to the jury that the deputy's earlier testimony had omitted the word "cousin" because of the court's own pretrial ruling?

6. Did the Court abuse its discretion in refusing to allow a Sexual Assault Nurse Examiner to testify regarding the phenomenon of delayed reporting and regarding the incidence of clinical findings in sexual assault examinations on the sole ground that the witness had insufficient training and experience to qualify as an "expert witness," when said witness had been a registered nurse for approximately ten years and had participated in numerous sexual assault examinations during those ten years, and had also recently achieved certification as a Sexual Assault Nurse Examiner?

7. Did the trial court violate RCW 7.69.030(10), and did it abuse its discretion, when it ordered that the victim advocate not escort the victim into the courtroom?

8. When a witness has been instrumental in assisting a criminal defendant with hiring a lawyer, does a court abuse its discretion when it prohibits the State from exploring these matters on cross-examination for purposes of showing witness bias or interest in the case, as well as for attacking the witness' credibility, when she has claimed that she never talked to the Defendant about the case?

C. STATEMENT OF THE CASE

The State agrees with the Appellant's Statement of the Case with the following additions. The complaining witness in this case is featured in some videos that are posted on YouTube under the heading of "Bella2234's Channel." As of the instant writing, this channel has a web address of <http://www.youtube.com/user/bella2234>. It is this YouTube channel that is the subject of Exhibit K, mentioned extensively in Appellant's Opening Brief.

1. Procedural history.

a. Pretrial motions in limine. Deputy Paul Jacobson had interviewed the Defendant as part of his investigation into the allegations of child rape. RP 3/30/2010 at 160-174. During the interview, William

Valdiviez told Deputy Jacobson that during the sexual intercourse with R.M. that occurred on December 25, 2008, he discontinued the intercourse because he knew that what he was doing was wrong. *Id.* at 173-174. When Deputy Jacobson asked him why it was wrong, Valdiviez stated, "because it was his cousin and she was only 15 years old." RP 3/30/2010 at 125. RP 3/30/2010 at 173-174. RP 3/30/2010 at 125. *See also*, RP 3/30/2010, at 126-127.

The State filed various Motions in Limine on March 24, 2010. CP 89-91. The State defended the mention of the word "cousin" by pointing out that the relationship of the people involved was an integral part of the *res gestae* of the offense, where the rape occurred during a family vacation, and the victim and perpetrator were both staying in the same hotel room, paid for by their mutual grandfather, and where the victim did not immediately report the incident to law enforcement. In the same Motions in Limine, the State moved to prevent the Defendant from playing the video entitled Bella2234, which had been posted on YouTube, arguing that any reference to this video was overly prejudicial. CP 89-91. The State further moved the court for a pretrial order that would prevent testimony as to prominent character traits of witnesses, or testimony regarding how the defendant or other witnesses have behaved on prior occasions, for purposes of proving conformity therewith on a particular

occasion. CP 89-91. This motion was brought, among other reasons, on grounds of improper use of character evidence. *Id.*

On March 26, 2011, the Defendant filed his own set of Motions in Limine, asking the court, among other things, to exclude all references to the "cousin" relationship and to exclude the testimony of Kathy Martin. CP 120-125. In arguing against allowing the testimony of Nurse Martin, the Defendant argued that Nurse Martin never met the complaining witness; never examined the complaining witness; never treated the complaining witness; and never reviewed any reports of the complaining witness. *Id.* Defendant further argued that there simply was no need for any expert testimony to explain the phenomenon of delayed disclosure, since this was something that the average layperson could figure out on her own. *Id.* Defendant further argued that Nurse Martin lacked appropriate credentials to testify as an "expert" witness. *Id.*

On March 26, 2010, the State filed its response to the Defendant's Motions in Limine. CP 126-142. In this response, the State argued that the "cousin relationship" was important evidence that would explain the victim's delay in reporting. *Id.* The State further argued that to suppress the "cousin relationship" would hamper the State's presentation of its case because the incident had taken place during a family vacation; and the familial relationships of the people involved was necessary in helping the

jury to understand the background of the case. *Id.* In its response, the State also cited *State v. Petrich*, 101 Wash. 2d 566, 575 (1984), noting that expert testimony was proper to show that delay in reporting is not unusual and that the length of delay correlates with the relationship between the abuser and the child. CP 126-142. The State also countered defendant's argument that delayed reporting was not something that expert testimony would be needed to explain to the lay jury. CP 126-142, citing *State v. Stevens*, 58 Wn.App. 478, 496 (1980); *State v. Graham*, 59 Wn.App. 418, 423-424 (1990); *State v. Cleveland*, 58 Wn.App. 634, 646 (1990). The State argued that a prosecuting attorney commits reversible error when he makes any argument in closing, with regard to delayed reporting, without having laid the proper foundation through expert testimony. CP 126-142, citing *State v. Warren*, 165 Wash 2d 17, 44 (2008). Finally, the State argued that "practical experience is sufficient to qualify a witness as an expert." CP 126-142, citing *State v. Ortiz*, 119 Wn 2d 294, 310 (1992).

The court held a hearing on the various motions in limine on March 26, 2010. RP 3/26/2010 at 1. At the motions in limine hearing, the court addressed the defense motion to exclude the testimony of Kathy Martin. RP 3/26/2010 at 25. The State explained that the information regarding delayed reporting goes beyond the knowledge of the average lay person and that therefore, such testimony requires a type of specialized

knowledge which Nurse Martin possessed. *Id.* at 26. The State also argued in favor of permitting testimony as to the relative infrequency of clinical findings during sexual assault examinations. *Id.* at 27.

The defense argued that Nurse Martin lacked the qualifications to testify as an expert. *Id.* at 29-32. Defendant further argued that such testimony would only be necessary if the defense first attacked R.M.'s credibility on the basis of her delay in reporting the incident. *Id.* at 31-32. The court ultimately decided that it would reserve on the issue. *Id.* at 34.

Finally, the State addressed the YouTube posting of Bella2234. *Id.* at 41. The State argued that the content of the video was a skit performed by the complaining witness and two of her friends, humorous in nature and intended to be a parody of two of their male acquaintances. *Id.* at 41-42. The State pointed out that the video contained vulgar language and sexual innuendo, and that it did not portray the complaining witness in a favorable light. *Id.* at 42. *See also* CD-rom of video entitled Bella2234, admitted in this hearing as Pre-trial Motion Exhibit J. The defense counsel stated that, if he were to offer the evidence at all, it would be during potential *rebuttal* of things the complaining witness might offer.¹ *Id.* at 43. Later the defense counsel stated, "Well, for the most part, I think I agree with Mr. Bustamante's concerns in this motion, subject, like I

¹ It is crucial here to note the significant distinction between evidence used in rebuttal and that which is offered for impeachment purposes.

guess anything, in the event Ms. Rebecca Morgan or the State somehow opened the door, then I'd feel it's appropriate to go into that, but as it reads, I agree with it." *Id.* at 45. At no time in the motion in limine hearing did the defense counsel state that he might offer evidence of the YouTube posting *for impeachment purposes*, pursuant to ER 608, to show that R.M. had misrepresented her age on prior occasions.

b. Preliminary rulings on pretrial motions. The court entered some partial rulings on the pretrial motions on March 29, 2010. See Court's Decision on Pretrial Motions, CP 144-145. In this ruling, the court held that the State could only mention the word "cousin" one time in opening and one time in closing, and that the State could only "solicit" [*sic*] the "cousin response" one time from R.M. *Id.* With regard to Nurse Martin's testimony, the court ordered that Ms. Martin could not testify until questioned by the parties outside the presence of the jury. *Id.* And with regard to the Bella2234 video, the court stated that it could make no ruling, having been unable to open the video to watch it. *Id.*

c. Nurse Martin questioned prior to trial. On the first day of trial, Kathleen Martin was questioned outside of the presence of the jury. RP 3/29/20 at 6-31. She testified that she had been a registered nurse for approximately 10 years. *Id.* at 7. She also testified that, during the time she was a registered nurse, she participated in an average of 12 sexual assault

examinations per year over a course of ten years. *Id.* at 27. She also testified that, since becoming a Sexual Assault Nurse Examiner, that she had personally performed about ten such examinations on her own. *Id.* Nurse Martin was prepared to testify with regard to the phenomenon of delayed reporting, not solely on the basis of her medical training, but on the basis of her professional experience. *Id.* at 12. Nurse Martin was prepared to testify that delayed disclosure is more commonly seen when the victim is related to the perpetrator. *Id.* at 11. Finally, Ms. Martin was prepared to testify that it is more common *not* to see clinical findings associated with reports of sexual abuse than it is to see actual signs of trauma during such examinations. *Id.* at 14.

The court acknowledged that the proffered testimony of Nurse Martin was something not generally understood by the average layperson. *Id.* at 38. But the court nevertheless ruled that Nurse Martin could not testify about delayed reporting or the absence of clinical findings. *Id.* at 37-41. Specifically, the court opined that Nurse Martin's academic research was too limited, as was her experience as a S.A.N.E. nurse. *Id.* The court expressly disregarded Kathleen Martin's ten years as a registered nurse, finding that only her experience as a S.A.N.E. nurse could qualify her to testify about these matters. *Id.* at 39-40.

d. The YouTube posting discussed at trial. On the second day of the jury trial, the subject of the semi-anonymous Bella 2234 YouTube posting again came up. RP 3/30/2010 at 8. The State indicated to the court that it had just been provided with a copy of something from a YouTube site, and that it was not clear how the defense intended to use this. Id. at 8-9. At this juncture, counsel for the defense asserted that he could use it during the cross-examination of R.M. Id. at 9. The State objected that it had just been presented with this document for the first time that very day. Id. at 27. Further, the State pointed out that the paper copy of the webpage was apparently printed out on March 22, 2010. Id. The State noted that, according to the text of the printout, it appeared that the poster's age stated was 19. Id. The State also argued that any use of the website posting to prove that R.M. represented her age to be 19 would be improper character evidence.² The State pointed out that, according to the webpage's wording, the Bella2234 persona was not one person but two, i.e., Becca and Caley, leaving open the possibility that either of the two was representing herself to be 19 years of age. Id. at 28.

² The State's Motion in Limine #8 asked the court to prohibit the use of character evidence for purposes of showing conformity therewith on a particular occasion. Although the court never specifically ruled on this motion, defense counsel indicated that he was in agreement. See RP 3/26/2010 at 50. The court later indicated its understanding that it had granted State's Motion in Limine #8. See RP 3/30/2011 at 31.

The defense counsel responded to the State's objections. *Id.* at 29-31. At no time did the defense counsel argue that the YouTube evidence was admissible under ER 608(b) as an example of specific instances of conduct, probative of truthfulness or untruthfulness, for the purposes of attacking the witness' credibility. Instead, the defense counsel stated:

"Your Honor, this is only potentially useful if she—as a prior inconsistent statement as to age representation and that's—the statute is RCW 9A.44.030 is pretty clear that this is—this age representation issue is a defense in a case like this and it's something that I'm entitled to go into. If she admits having projected herself as being older than she really is in this type of medium, then I won't have grounds to use it; if she denied it, then I will. This is a significant issue as to—as to how it relates to all the perceptions and the evidence that, again, is part of the statutory defense in this case and it talks—this statute talks about declarations as to age by the alleged victim and there's wide open ground as to where those declarations are made and how they're perceived—and at what point they're perceived by the Defendant and so forth. So that's—that's the extent of my argument on that." *Id.* at 29-30.

The court noted that it had ruled on the question of whether evidence of past behavior could come in to show conformity therewith on a particular occasion. RP 3/30/2010 at 31. The defense counsel responded:

"Well, the issue is whether—there's two. The central issue is whether Mr. Valdiviez has relied upon her representations and so I'm trying to establish what representations have been made both, you know, to his face as well as in mediums that he would have been free to explore, and so I have a difficult time in discussing that without potentially getting into Fifth Amendment issue I suppose you'd call it with my client's potential statements." *Id.*

Again, the defense counsel, when given an opportunity to defend the use of the YouTube posting, never articulated in any clear way that he intended to use it as ER 608(b) evidence offered to attack the complaining witness' credibility. To state this another way, there was never a clear offer of proof that the YouTube posting was proffered by the defense for purposes of impeachment under ER 608(b). Instead, the defense counsel gave the impression that the evidence was offered to prove Valdiviez's statutory affirmative defense, i.e., that he reasonably believed R.M. to be 16 years old, based on R.M.'s representations as to her age.

During the state's case-in-chief, the court heard additional arguments on this head. RP 3/30/10 at 107-114. Here, defense counsel sought to explore the YouTube posting during cross-examination, when the State had never questioned R.M. on direct, as to things she had said or had not said to William Valdiviez with regard to her age. Again, most of the defense counsel's arguments centered around the admissibility of the evidence to prove his affirmative defense:

"What I guess I would be concerned about is I think that I'm entitled to explore issues that have been raised by this and any other witness related to this defense. She has certainly testified as to representations she made about 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. 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 had made this document relevant, I would tell the court my a sidebar that that's where I think I'm at." *Id.* at 111-112.

The court ruled that there would be no mention of the YouTube posting during cross examination of the witness. *Id.* at 114.

The subject of the YouTube posting came up yet a third time during the trial, when the court heard arguments from counsel during a break in the testimony of R.M., and outside the presence of the jury. Once again, defense counsel was given an opportunity to explain to the court the purpose for which testimony regarding the YouTube posting would be offered. *See* RP 3/30/2010 at 148-151:

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 direct?

MR. HESTER: I couldn't disagree more. I think they have addressed this, or the State's addressed this on direct when it talked about those claimed conversations; that the purpose of those conversations was to assert Mr.—that Mr. Valdiviez believed her age to be 15 rather than 16. It's ripe and it's relevant to cross-examination. I also think that there is a bit of economy that favors doing that instead of me having to call her during my case-in-chief and it probably is an overall—I mean, it—you know,--

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

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

MR. HESTER: Well, and I—again, I don't mean to be—well, I guess I do mean to be redundant. I just want to make sure that I lodge my objection. I have some level of expectation of what your ruling's going to be based upon our prior discussions and I want to make sure at the appropriate point that I believe I've laid the right foundation to do this now. But I think it's appropriate because it says, "based upon declarations as to age by 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 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.

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 re-state that I still believe that statute is clear that the 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. Even if it was prior to December

25, 2008—well, I just believe the statute's clear. We're just reading it differently, and I could be wrong. I don't—I guess we'll just find out but I—I don't believe I am.... RP 3/30/2010 at 148-151.

e. Cross-examination of Vivien Smith. Prior to cross-examining Vivien Smith, the State asked the court for permission to question the witness about her involvement in hiring an attorney for Mr. Valdiviez in order to attack her credibility and for purposes of showing bias or interest. RP 03/31/2010 at 25-26. The court denied the motion. *Id.* at 31.

f. The Court's order regarding the victim advocate. During the second day of trial, just before the State was to re-call R.M. for continued direct examination, the court instructed the prosecutor, "[W]ould you please go out in the rotunda. 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." RP 03/30/2010. The State did not object to this directive.

2. Trial testimony.

a. Testimony relating to control of the premises. Testimony at trial established that the hotel suite in which R.M. stayed consisted of a living room, a kitchen, and one bedroom. RP 3/30/2010 53-54. R.M. testified that the room in which she consumed alcohol was the bedroom and that it was the Defendant's room. *Id.* at 56. Photographs were introduced into evidence depicting surroundings which R.M. identified as the hotel room in question. *Id.* at 74-75. *See also* Trial Exhibit 1 and Trial

Exhibit 2. Exhibit 1 shows the defendant in a room with a refrigerator in the background. He is pointing a gun at a can of beer. Exhibit 2 shows a sink with a counter top. Lying on the counter top are a gun with three ammunition clips, a set of keys, and a beer can identical to the one that the Defendant was seen holding in Exhibit 1. R.M. positively identified the location in Exhibit 2 as the bathroom of the hotel room she had stayed at. *Id.* at 75-76. R.M. also identified the gun and the car keys lying on the bathroom counter in Exhibit 2 as the Defendant's gun and car keys. R.M. testified that she slept on a roll-away bed and that the Defendant's girlfriend Donna slept in the bedroom with the door closed. *Id.* at 92-94. R.M. testified that the Defendant did not sleep in the bedroom with Donna because of a fight that he had with Donna earlier, giving rise to the inference that William and Donna would have shared the bedroom, and that R.M. would have slept alone in the pull-out couch, *but for* the argument that William and Donna had earlier. *Id.* at 94-95. When R.M. awoke the next morning, The Defendant was in the kitchen fixing breakfast. *Id.* at 95. The Defendant had a key to the hotel room. *Id.* at 157.

Further evidence regarding dominion and control of the room was provided by Valdiviez himself. *See, e.g.*, RP 3/31/2010 at 81. When asked where the gun was while he was with R.M. at the beach, the

Defendant testified that it was in the jacket pocket of his jacket, which he had left behind in the apartment, in the bedroom, in the chair in the corner. Id.

b. Testimony regarding misrepresentations as to age.

During William Valdiviez's testimony, he related several conversations with R.M. which had led him to believe that her true age on December 25, 2008, was 16. RP 3/31/2010 at 72-76. Mr. Valdiviez also testified that, prior to the trip, he had received information from his mother indicating that R.M. would be turning 16 on December 25, 2008. RP 3/31/2010 at 77. But at no time during Mr. Valdiviez's testimony did he attribute his belief to anything he had seen on the internet, such as the YouTube posting of Bella2234, which listed the poster's age as 19. There was no testimony offered that William Valdiviez or Vivien Smith or anyone else had actually seen or heard of the YouTube posting prior to the December, 2008, trip to Long Beach. Vivien Smith never mentioned the YouTube posting during her testimony. RP 3/30/2010 at 39-54.

D. ARGUMENT

1. The Court did not err in prohibiting cross-examination of R.M. on the subject of the YouTube posting during the State's case-in-chief, when such questions went beyond the scope of direct examination and were not offered for impeachment purposes.

The information contained in the semi-anonymous YouTube posting, alluded to as Exhibit K, could conceivably have been admissible, but in fact 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 based upon her representations as to age. This would include evidence that R.M. had a motive to portray herself as older than she really was.³

Theory 2: for impeachment purposes as a prior inconsistent statement, under ER 801(1), and following the procedure set forth in *State v. Babich*, 68 Wash. App. 438, 443, 842 P.2d 1053 (1993).⁴

Theory 3: for impeachment by contradiction, which is similar to, but distinct from, impeachment by prior inconsistent statement.

Theory 4: for purposes of attacking the 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. In order for the court to properly exercise its discretion under this theory, it must first be apprised of the proponent's intention to use the evidence for this purpose, and must be given the opportunity to determine whether or not the proffered evidence is actually probative of

³ The motive to portray oneself as being older than her true age, in settings outside the courtroom, should be distinguished from the motive to lie on the witness stand.

⁴ Appellant has not addressed this theory in his Opening Brief, and should therefore be precluded from raising it for the first time in his response brief.

truthfulness or untruthfulness. As will be amply demonstrated, *infra*, the trial court was well within its discretion to prohibit mention of the YouTube posting during the cross-examination of R.M. by defense counsel during the State's case-in-chief.

a. The Defendant did not preserve the issue on appeal by making a satisfactory offer of proof, or by requesting a final ruling on the matter at the proper time during the trial.

i. Defendant requested a final ruling prematurely; then failed to renew the request later in the trial, when the question was ripe. To appeal a ruling excluding evidence, the defendant must seek a final ruling if the court's ruling on a motion in limine is only tentative. *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994). This must be done at a time in the trial when the question is ripe for a final ruling and not before. The main difficulty with regard allowing cross examination concerning the YouTube posting pursuant to Theory 2 and Theory 3 above is that nothing in the YouTube posting directly contradicts the substance or spirit of anything that the witness said on direct examination. It was only during rebuttal that the State ever questioned R.M. about things that she said or did not say to William and his mother, either before or during the trip. The main difficulty with admitting the YouTube evidence under Theory 1 (i.e., as substantive evidence supporting his affirmative defense) was that the Defendant attempted to introduce the YouTube evidence when it was

beyond the scope of direct examination when he should have attempted to introduce it during the Defendant's case-in-chief, which he never did. The Defendant might have made a somewhat more credible showing that such questioning was appropriate for cross-examination during the rebuttal phase of the trial, *after* the state had questioned R.M. about her representations as to age; but he never did renew his motion during the rebuttal phase of the trial.

ii. No adequate offer of proof was made. It is the duty of a party to make clear to the trial court what it is that he offers in proof, *and* the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer. *Smith v. Seibly*, 72 Wash.2d 16, 18, 431 P.2d 719 (1967), citing *Tomlinson v. Bean*, 26 Wash.2d 354, 361, 173 P.2d 972, 976 (1964); *Cameron v. Boone*, 62 Wash.2d 420, 383 P.2d 277 (1963); *Dakin v. Dakin*, 62 Wash.2d 687, 384 P.2d 639 (1963); *Blood v. Allied Stores Corp.*, 62 Wash.2d 187, 381 P.2d 742 (1963). A trial court may properly exclude evidence when there has been an inadequate offer of proof. See, e.g., *State v. Lubers*, 81 Wash.App. 614, 623, 915 P.2d 1157 (1996) (inadequate offer of proof failed to establish the relevance of the proffered evidence to attack credibility).

Appellant William Valdiviez challenges his conviction on the grounds that he was deprived of ability to effectively cross-examine the complaining witness to show motive or credibility. *See Appellant's Opening brief at 29.* But Valdiviez never offered the questions about the YouTube posting for purposes of showing motive or for attacking the witness' credibility, despite having been given numerous opportunities to do so, both during the March 26, 2010, motion in limine hearing and at trial. As demonstrated in the procedural history section of this brief, the defense attorney at no time made any offer of proof that the YouTube evidence was offered for purposes of attacking R.M.'s credibility, either under ER 801(1) or under ER 608(b), or for purposes of showing motive. *See pages 9-10, supra. See also pages 12-16, supra.* Not only did this omission deprive the trial court of any meaningful opportunity to access the value of the information contained in the YouTube posting as impeachment evidence or as evidence of instances of conduct, probative of truthfulness or untruthfulness, offered to attack the credibility of R.M., it also resulted in failure to preserve the issue on appeal.

Specific instances of lying may be admitted for impeachment purposes whether sworn or unsworn, but their admission is highly discretionary. *State v. Kunze*, 97 Wash.App. 832, 988 P.2d 977 (1999), *reconsideration denied, review denied* 140 Wash.2d 1022, 10 P.3d 404. In

the context of impeachment, evidence of a witness's prior misconduct is only admissible if it is probative of the witness's character for truthfulness under the applicable evidentiary rule. *State v. Cochran* 102 Wash.App. 480, 8 P.3d 313 (2000), review denied 143 Wash.2d 1004, 20 P.3d 944. In exercising its discretion to permit cross-examination of witness as to misconduct as probative of truthfulness or untruthfulness, the trial court should consider whether the instance of misconduct is relevant to the witness's veracity on the stand. *State v. Gregory*, 158 Wash.2d 759, 147 P.3d 1201 (2006); *State v. O'Connor* 155 Wash.2d 335, 119 P.3d 806 (2005). Because defense counsel never apprised the court that it was offering the evidence as evidence of misconduct probative of truthfulness or untruthfulness, to attack the witness' credibility, the defense effectively deprived the court of any meaningful opportunity to exercise its discretion.

While not admissible to prove a witness' character or to show that he or she acted in conformity with that character, as set forth in ER 404(a) and in ER 608(a), evidence of specific conduct that is probative of truthfulness or untruthfulness may, *in the discretion of the court*, be admissible for purposes of attacking witness credibility. ER 608(b). As in the case of a 404(b) motion, the trial court must identify the purpose for which the evidence is sought to be introduced, and determine whether the evidence is relevant to prove that for which it is offered. *State v. Smith*,

106 Wash.2d 772, 776, 725 P.2d 951 (1986); *State v. Saltarelli*, 98 Wash.2d 358, 655 P.2d 697 (1982); ER 402. The relevancy determination requires that the purpose for which the evidence is sought to be introduced is of consequence to the outcome of the action and that the evidence tends to make the existence of the identified fact more probable. *Smith*, 106 Wash.2d at 776, 725 P.2d 951; *Saltarelli*, 98 Wash.2d at 362-63, 655 P.2d 697. If the court finds the information relevant, it must then weigh the probative value of the evidence against its prejudicial effect. *State v. Jackson*, 102 Wash.2d 689, 694, 689 P.2d 76 (1984).

An offer of proof serves three purposes when a trial judge is considering the exclusion of evidence: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review. *State v. Ray*, 116 Wash.2d 531, 538, 806 P.2d 1220 (1991). While the offer of proof need not be “in detail”, *Ray*, 116 Wash.2d at 539, 806 P.2d 1220, the offer must communicate to the trial court the substance of the evidence in question so as to make clear to the trial court what is being offered in proof, and why the offer should be admitted over the opponent's objections, so the court may make an informed ruling. *Ray*, 116 Wash.2d at 539, 806 P.2d 1220.

The entire context of the YouTube posting shows why nothing contained in it may be deemed to be probative of truthfulness or untruthfulness. 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. Thirdly, all of the videos contained in Bella2234's YouTube channel were slapstick, satirical, and tongue-in-cheek. This tone clearly indicates to the viewer that the things "communicated to the world" through this YouTube channel were not intended to be serious. This stands in sharp contrast with the prior false statements mentioned in the case law that Appellant cites, which deal with false statements made under oath in official proceedings offered for impeachment. *See Appellant's Opening Brief at 32-36.*

Once the court makes its determination that the proffered evidence is probative of that for which it is offered, the proponent still must overcome the balancing test of probative vs. prejudicial. It is worthwhile noting that, during the pretrial motions hearing, the defense counsel went so far as to indicate his agreement that the YouTube video entitled Bella 2234 should not come in, and agreed with the State's concern that such evidence was more prejudicial than probative. RP 3/26/2010 at 45. Had

the defense wanted to admit the YouTube evidence under ER 608(b), the pretrial hearing would have been the perfect opportunity to do so.

b. The Defendant consistently argued that the evidence was offered to prove his affirmative defense.

After having explained the purpose of the YouTube evidence to the trial court, in terms of its usefulness in establishing his affirmative defense, Mr. Valdiviez cannot now complain that it should have been admitted under an entirely different legal theory. *See* Appellant's Opening Brief at 29-36. Appellant essentially argues that evidence should have been admissible under legal theories (i.e., "motive and credibility" and ER 608), that were *not argued at the trial level*. At trial, when arguing for the admissibility of the YouTube evidence, defense counsel *never once* mentioned the *any* of the words "motive" or "impeachment" or "credibility" or "Evidence Rule 608(b)" as Appellant now argues on appeal. *See* pp. 12-16, *supra*.

c. The information contained in the YouTube posting was not admissible substantive evidence tending to prove the affirmative defense because it was not relevant except to show motive.

In order to be admissible in a trial, evidence must first be relevant. ER 402. Irrelevant evidence is inadmissible. *Id.* Mr. Valdiviez's affirmative defense held that he reasonably believed R.M. to be 16 based upon her representations as to age. The main problem in admitting the

YouTube evidence for this purpose is that there was never evidence that William Valdiviez had seen or heard of the YouTube posting, much less that he reasonably relied upon it; and hence, it does not serve to make his defense more probable in any way. Character evidence is inadmissible to show conformity therewith on a particular occasion. ER 404(a); ER 608(a). Thus, Valdiviez may not argue that R.M. lied about her age on a specific occasion, and hence, she probably lied about her age on this occasion as well. This would be in violation of ER 404(a) and ER 608(a). And while Valdiviez argues that he reasonably believed R.M.'s statements that she was 16, it is a considerably farther stretch for him to have believed that his young cousin was 19, as allegedly stated in the YouTube posting.

Nevertheless, the court only ruled that Valdiviez could not use the YouTube evidence for purposes of cross-examination during the State's case-in-chief. It never ruled that he could not use it in his own case-in-chief. 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. But Defendant never made any such attempt, and never offered the evidence to show R.M.'s motive at any time during the trial.

i. There was no evidence that the YouTube posting existed prior to the December, 2008, family vacation. The date of the YouTube printout was March 22, 2010, clearly well after the December 25, 2008, incident which was the subject of the criminal charges against Mr. Valdiviez. RP 3/30/2010 at 27. The Defendant never made any claim, or offered any proof, that it ever existed prior to the time of the offense.

d. The information contained in the YouTube posting was not admissible as a prior inconsistent statement of R.M.

Appellant does not argue the theory of impeachment specifically by prior inconsistent statement. *See* Appellant's Opening Brief at 29-36. Nevertheless, the State addresses this issue preemptively, in case the Appellant should try to raise it for the first time in his reply brief, which he should not be permitted to do.

The information contained in the YouTube posting referred to the poster as Bella2234, but gave the poster's name as "Becca and Caley," suggesting that Bella2234 was not a real person in the normal sense of the word. The poster's age, listed as 19, is not properly characterized as a "prior statement" of the witness, because there was no evidence that the

witness actually made a statement, or that she intended the posting as a factual communication to any person. Because the information contained in the YouTube posting is not properly characterized as a statement, it cannot be a prior inconsistent statement. In order to qualify as a prior inconsistent statement, the proffered statement must also be inconsistent with R.M.'s testimony. The information contained in the YouTube posting is not inconsistent with R.M.'s testimony because R.M. never testified during direct examination that she had never misrepresented her age to anyone in her entire life. Even on cross, R.M. only testified that she did not tell William or William's mother, Vivien Smith, immediately prior to the trip, that she would be turning 16 during the trip. RP 3/30/2010 at 126-127. These were very specific statements about what she said or did not say, to two specific individuals during a specific window of time. Under these circumstances, the information contained in the YouTube posting simply does not qualify as a prior inconsistent statement because it does not contradict anything that R.M. said on the witness stand.

A careful analysis of what R.M. actually said on the witness stand reveals why the YouTube evidence was not admissible under ER 801(1):

i. Direct examination. R.M. testified that she was born on December 25, 1993. RP 3/30/2010 at 39. On March 30, 2010, the second day of trial, R.M. testified that her current age was then 16. RP 3/30/2010

at 42. She testified that, when she first travelled from her home in Texas to Washington State on December 19, 2008, she was 14, and William Valdiviez was 25. *Id.* at 49-50. R.M. testified that William Valdiviez knew that she was about to turn 15. *Id.* at 55. When asked why she said that, she answered that he had said to her, "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." *Id.* R.M. also testified that in Texas, a person can get a learner's permit at the age of fifteen; and that a person must be sixteen years of age to get a driver's license. *Id.* This was the extent to R.M.'s direct testimony regarding her age. At no time during R.M.'s direct examination did she testify to any representations (or the lack of representations) by her to the Defendant regarding her age.

ii. Cross examination. On cross-examination, R.M. was asked whether, in the days leading up to the trip, she had told the defendant over the telephone that she would be turning 16 during the trip; to which R.M. answered "no." *Id.* at 127. She also denied mentioning to Vivien Smith that she would be turning 16 during the trip. *Id.* In fact, she denied ever speaking to Vivien Smith at all in the months leading into the trip. *Id.* Both of these questions went beyond the scope of direct examination.

Defense counsel paused during his cross examination to inform the court of his intention to ask R.M. whether she had in fact represented

"beyond William and beyond the family, in fact, including the internet world," that she was older than 16, citing his right to explore any testimony that touched on this defense. The state objected that the question went beyond the scope of direct examination and also that it elicited hearsay without an applicable exception. *Id.* at 130.

The court ruled that the defense counsel could not inquire into the YouTube posting during cross examination, but left open the possibility that it could come in later provided that there was some evidence that the Defendant had actually seen it prior to December 25, 2008. *Id.* at 150.

iii. Rebuttal—direct examination. After the defense had presented its case, including the testimony of Vivien Smith and William Valdiviez, the State recalled R.M. as a rebuttal witness. During rebuttal, R.M. was asked, "Ms. Morgan, during the trip to Long Beach from December, 2008, did you ever tell... William Valdiviez that your age was 16?" RP 3/31/2010 at 102. She answered that she had not. *Id.* She was then asked, "Did you tell *anybody* that you were 16?" *Id.* Again she answered that she had not. *Id.* She was asked, "Did you ever make any statements to Vivien Smith that you were turning 16?" *Id.* at 104. She replied that she had not. *Id.* at 104. She was asked, "Did you ever make any statements to Vivien Smith that when—that in December of 2008 you were going to turn 16 and be legal to drive?" *Id.* R.M. answered, No, I

never told her that." Id. She was then asked whether she was aware of any reason why Vivian Smith would know her true age, whereupon R.M. described several circumstances, such as birthday celebrations, family gatherings, and birthday cards, all indicating that Vivien Smith knew her true age. Id. at 105-106. R.M. testified that William Valdiviez was at many of these birthday celebrations and that he would have heard statements made by family members as to R.M.'s age. Id. at 106. R.M. added, "He's always gotten my age right." Again, R.M. related statements that the defendant had made indicating that he was aware of her true age. Id. at 107. R.M. denied that, during December, 2008, she never had a conversation with William Valdiviez in which she told him that she was going to be legal to drive at midnight. Id. at 108.

iv. Rebuttal cross-examination. The defense counsel had an opportunity to cross-examine R.M.'s rebuttal testimony regarding the issue of age representations but chose not to do so. Id. at 110.

v. Conclusions regarding R.M.'s testimony. R.M. was never asked whether she had *ever* lied about her age, and never testified to this. The questions put to her on this issue, during the State's case-in-chief, were very specific and focused on the Defendant's knowledge, not on R.M.'s representations. During cross-examination, defense counsel started to ask R.M. about conversations she had with William Valdiviez and his

mother, Vivien Smith, immediately prior to the December 2008 trip. R.M. testified that she never told anyone that during any of these conversations that she would be turning 16 during the trip.

After R.M. testified on rebuttal, Defense counsel never renewed his motion to cross-examine her with regard to the YouTube evidence. Therefore, in considering Appellant's claim that he was denied his right to conduct cross-examination, as in Appellant's Opening Brief at 29-36, the reviewing court should only look at those things that R.M. said during the State's case-in-chief. Even under the most charitable analysis, the information contained in the YouTube posting cannot be construed as containing any statement "inconsistent" with R.M.'s testimony at trial. Had she testified that she *always* told the truth about her age the analysis would be quite different.

e. The court properly based its ruling on the offer of proof given by defense counsel, which was that the YouTube posting was relevant to prove the affirmative defense that the defendant reasonably believed R.M.'s to be 16 based upon her representations as to age, and not on its potential value as impeachment evidence.

In his Opening Brief, Appellant cites cases such as *State v. McDaniel*, 83 Wn. App. 179, 920 P.2d 1218 (1996) for the proposition that a trial-court's prohibition against cross-examination regarding specific instances relevant to veracity constitutes reversible error. *See Appellant's Opening Brief* at 32. The flaw in this analogy is that in those cases, the

defendants specifically proffered the testimony for impeachment purposes, whereas here, the Defendant never did so. For example in *McDaniel*, during Graham's testimony, counsel for defendant Fox requested clarification regarding whether the defendants could impeach Graham by raising her admission that she had lied about the recency of her drug use during her deposition in a related civil suit. *McDaniel*, 83 Wn. App. 179, 182-183. The court refused to allow the defendants to impeach Graham with her admission that she had lied under oath. *Id.* Here, there was no such request by Valdiviez's defense counsel to impeach R.M. by raising her alleged "statement" about her age contained on in YouTube profile. Furthermore, the witness' dishonest conduct in *McDaniel* was lying under oath in a prior civil proceeding, where it was clear that it was the witness herself who had made the false statements and that she had done so under penalty of perjury. Here, R.M.'s allegedly false "statement" was not under oath but was contained in a semi-anonymous user profile; and there is no evidence that it was R.M. who actually provided the false information with regard to age.⁵ RP 3/30/2010 at 28. Similarly, in *State v. Wilson*, 60

⁵ Appellant incorrectly states, at 33, "In the present case, it is undisputed that Rebecca lied to the world when she said she was 19 in the You Tube Post, since she was only 16 at the time of trial." This claim is highly misleading. The State has never acknowledged, and the defense never provided any proof, that it was actually Rebecca who supplied the information as to the YouTube poster's age. It is not even clear who Bella2234 is, whether Bella2234 is even a real person, or whether age 19 refers to Becca or to Caley. *See* RP 3/30/2010 at 28. The State only acknowledged that R.M. participated in the videos that were posted under this screen name.

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Wn. App. 887, 893, 808 P.2d 754 (1991), cited by the Appellant at 32, the trial court properly ruled that the defendant's wife could be cross-examined regarding *an admittedly false statement made under oath*. And in *Wilson*, once again, the prior false statement was clearly offered for purposes of impeachment, whereas in the instant case, counsel for Valdiviez never made it clear that he was offering the YouTube evidence to impeach R.M.'s credibility.

f. Even if the court erred in prohibiting mention of the YouTube posting, the issue does not survive a harmless error analysis.

It was undisputed that the Defendant engaged in sexual intercourse with R.M. at a time when R.M. was 15 years of age. The primary bone of contention as to Count 1 was whether the Defendant reasonably believed her age to be 16. Defendant seeks to overturn his conviction based on the refusal of the court to allow evidence of the YouTube posting in order to attack the witness' credibility. But the State's evidence showing the Defendant's knowledge was so overwhelming, and the YouTube evidence so unpersuasive, even for impeachment purposes, that there is little likelihood of a different outcome, even if the court had not ruled as it did.

2. The court did not err in permitting the case for furnishing liquor to a minor, by permitting R.M. to consume alcohol on the Defendant's premises, to go to the jury.

In order to prove that the Defendant was guilty of the crime of furnishing alcohol to a minor, the State had to prove that, on or about December 25, 2008, he sold, gave, or otherwise supplied liquor to any person under the age of twenty-one years, or that he permitted any person under that age to consume liquor on his or her premises or on any premises under his or her control. RCW 66.44.270(1). For the purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. *Id.* If the State introduced evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that the room in question was the bedroom located in William Valdiviez's hotel suite, then the conviction must stand.

To permit a person to consume liquor in his hotel room does not, as Appellant argues, entail any authority to exclude that person from the premises. In order to show that William "permitted" R.M. to consume liquor in his hotel room, the State introduced evidence that he did much more than "permit" her—he actively *encouraged* R.M. to drink. See RP 3/30/2010 at 54-56. The State introduced evidence that the alcohol was William's and that he had the ability to withhold it from R.M. RP 3/30/2010 at 54. R.M. testified:

"Well, at around 11:00 William tried to give me a beer and I didn't want to—I didn't want anything to drink and he told me if I didn't drink the beer, then I couldn't have—I couldn't have any of the Crown Royal, so I dumped the beer down the sink and told him that I drank it. And then at midnight we all took a shot and toasted to, you know, my birthday and Christmas." *Id.*

During William Valdiviez's testimony, he also acknowledged that the Crown Royal in the hotel room was his, and that he kept it in the freezer located in the hotel suite. *See* RP 3/30/2010 at 78.

An appellate court reviews a claim of insufficient evidence for whether “any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Yarbrough*, 151 Wash.App. 66, 96, 210 P.3d 1029 (2009) (citing *State v. Rempel*, 114 Wash.2d 77, 82, 785 P.2d 1134 (1990)). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences therefrom. *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254 (1980).

Here evidence was presented that the room where the consumption of liquor occurred was William's room. For example, when asked whose room it was, R.M. testified that it was William's room. RP 3/30/2010 at 56. Photographs were introduced into evidence depicting surroundings which R.M. identified as the hotel room in question. *Id.* at 74-75. *See also* Trial Exhibit 2. Exhibit 2 shows a sink with a counter top. Lying on the counter top are a gun with three ammunition clips, a set of keys, and a

beer can identical to the one that the Defendant was seen holding in Exhibit 1. R.M. positively identified the location in Exhibit 2 as the bathroom of the hotel room she had stayed at. *Id.* at 75-76. R.M. also identified the gun and the car keys lying on the bathroom counter in Exhibit 2 as the Defendant's gun and car keys. The fact that the defendant had the key to the room and that he laid his car keys and his gun down on the counter is circumstantial evidence of dominion and control. R.M. also testified that she slept on a roll-away bed, also referred to as a pull-out couch, at the hotel room, and that the Defendant's girlfriend Donna slept in the bedroom with the door closed. *Id.* at 92-94. R.M. testified that the Defendant did not sleep in the bedroom with Donna because of a fight that he had with Donna earlier, giving rise to the inference that William and Donna would have shared the bedroom, and that R.M. would have slept alone in the pull-out couch, *but for* the argument that William and Donna had earlier. *Id.* at 94-95. This gives rise to the reasonable inference that William and his girlfriend had a superior possessory interest over the bedroom where the drinking had occurred, whereas R.M., who had to sleep in a roll-away bed, had an inferior possessory interest, not only over the bedroom, but over the entire hotel suite as well. When R.M. awoke the next morning, the Defendant was in the kitchen fixing breakfast. *Id.* at 95. 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.

Further evidence regarding dominion and control of the room was provided by the Defendant's testimony regarding his gun. *See, e.g.*, RP 3/31/2010 at 81. When asked where the gun was while he was with R.M. down at the beach, shortly after midnight, the Defendant testified that it was in the jacket pocket of his jacket, which he had left behind in the apartment, in the bedroom, in the chair in the corner. *Id.* A handgun is not the sort of thing that a person leaves lying around just anywhere. A reasonable jury could infer, from the fact that the Defendant had left the gun inside of his jacket pocket, and that he left his jacket hanging from a chair in the corner of the bedroom, that this bedroom was "his room" for purposes of RCW 66.44.270.

The Appellant argues that, because R.M. had access to the room, and because his grandfather had agreed to pay for the room, the State did not prove that he controlled the premises for purposes of RCW 66.44.270(1). However, the State presented evidence that R.M. identified the room as Valdiviez's bedroom and that the bedroom contained items belonging to Valdiviez. *Dominion and control over premises need not be*

exclusive. *State v. Wood*, 45 Wash.App. 299, 312, 725 P.2d 435 (1986). A rational trier of fact could find that William Valdiviez had dominion and control over his bedroom and over the hotel suite as well. Furthermore, Valdiviez encouraged R.M. to consume alcohol there, knowing that she was not yet 21 years of age. It was not necessary for the State to prove that Valdiviez had any authority to exclude R.M. from the premises. The State presented sufficient evidence.

3. The court erred in limiting the State's use of the word "cousin."

Although the court has considerable discretion in the presentation of evidence at trial, where evidence may be unfairly prejudicial, a court abuses its discretion when a decision is based on untenable grounds or for untenable reasons. *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004). Here, restricting the State's use of the word "cousin" to a total of three times during the entire trial unreasonably hampered the State in presenting its case, especially when, as here, the Defendant was maintaining that he was misled as to the victim's true age, and where, as here, the victim did not immediately report the incident to the police because she did not wish to ruin a family Christmas gathering.

Furthermore, the court's ruling indirectly forced Deputy Jacobson to give an inaccurate description of what the Defendant told him during his investigation. The Defendant had told Deputy Jacobson that he

discontinued the intercourse because he realized that what he was doing was wrong, and added that it was wrong because she was his cousin and because she was only 15. RP 3/30/2010 at 125. The court's ruling caused Deputy Jacobson to misquote what Valdiviez said. Later, when the Defendant contradicted Deputy Jacobson's testimony by testifying that he told Deputy Jacobson that what he had done was wrong because R.M. was his cousin, this cast confusion in the minds of the jury as to what the Defendant's statements really were. And when Deputy Jacobson was not permitted to explain truthfully why he had omitted part of the Defendant's statement, it also improperly cast doubt on Deputy Jacobson's credibility. See RP 3/30/2010 at 125-127; RP 3/31/2010 at 193-196.

4. The court erred in prohibiting the testimony of Kathleen Martin.

The state offered the testimony of Kathleen Martin for two purposes: (1) to explain the delayed disclosure (a.k.a. delayed reporting) and (2) to educate the jury as to the relative infrequency of clinical findings in sexual assault cases in general. ER 702 allows qualified experts to testify regarding “scientific, technical, or other specialized knowledge” if the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *State v. Thomas*, 123 Wash.App. 771, 778,

98 P.3d 1258 (2004); *State v. Farr-Lenzini*, 93 Wash.App. 453, 461, 970 P.2d 313 (1999).

Division One of the Washington Court of Appeals allowed an expert to testify about common symptoms associated with sexual abuse in *State v. Stevens*, 58 Wash.App. 478, 496, 794 P.2d 38 (1990) (finding expert testimony did not invade the province of the jury where the expert only testified generally as to behaviors consistent in sexually abused children that she had observed in her own experience working in the field). The court observed that Washington cases since *State v. Black*, 109 Wash.2d 336, 745 P.2d 12 (1987), have made clear that expert testimony generally describing symptoms exhibited by sexual abuse victims may be admissible when relevant and when not offered as a direct assessment of the victim's credibility. *Stevens*, 58 Wash.App. at 496, 794 P.2d 38. As an example, the Court of Appeals cited the Supreme Court's approval of expert testimony describing the symptoms of battered women syndrome in *State v. Ciskie*, 110 Wash.2d 263, 279-80, 751 P.2d 1165 (1988). This evidence was helpful to the jury's understanding of a matter outside the competence of an ordinary layperson and admissible to rebut any presumption that the victim's behavior was inconsistent with that of a rape victim. *Ciskie*, 110 Wash.2d at 278-79, 751 P.2d 1165.

In another Division One decision, the court admitted general

testimony concerning the “recantation phenomenon” to explain why the complaining witness in a child sexual abuse case had recanted before trial. *State v. Madison*, 53 Wash.App. 754, 764, 770 P.2d 662 (1989). The court distinguished *Black* on the basis that the evidence in *Madison* was not offered to prove that rape had occurred. *Madison*, 53 Wash.App. at 765, 770 P.2d 662. Similarly, expert testimony regarding rape trauma syndrome was admitted, not to prove that abuse occurred, but to explain that the victim's delay in reporting the abuse was not inconsistent with her allegations in *State v. Graham*, 59 Wash.App. 418, 423-24, 798 P.2d 314 (1990). See also *State v. Cleveland*, 58 Wash.App. 634, 646, 794 P.2d 546 (1990) (testimony regarding typical behaviors of child victims of sexual abuse was admissible to aid jury in evaluating victim's testimony).

In *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), after noting that expert testimony is proper to corroborate a victim's testimony, the Washington Supreme Court held that the trial court did not abuse its discretion in allowing the State's expert to testify to the statistics ‘that supported her opinion that delay in reporting is not unusual and that the length of delay correlates with the relationship between the abuser and child.’ 101 Wn.2d at 575. But the *Petrich* court also held that identifying the defendant as a member of a group having a higher incidence of child abuse is improper because it invites the jury to conclude ‘that because of

defendant's particular relationship to the victim, he is statistically more likely to have committed the crime.' 101 Wn.2d at 576. Here, the State did not offer any testimony that William Valdiviez was a member of a group with a higher incidence of child abuse, nor did the State intend to introduce testimony indicating that the complainant, R.M., belonged to any particular class of people having a greater tendency to be a victims of sexual abuse. The proffered testimony was merely that, based on Nurse Martin's training and experience, it is not uncommon for adolescents reporting sexual abuse to delay reporting.

In *State v. Jones*, 71 Wn.App. 798, 863 P.2d 85 (1993), the CPS caseworker testified that the victim exhibited behaviors that were common among sexually abused children, such as sexually acting out and experiencing nightmares. The *Jones* court concluded that such expert testimony generally was not admissible unless it met the *Frye* standard. *Jones*, 71 Wn.App. at 818. But the *Frye* standard is not applicable when the witness bases her testimony on her own experience, training, and observations. *Jones*, 71 Wn.App. at 818. The court explained:

We agree that when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in *Frye*. When the testimony is limited to the witness's observations of a specific group, the *Frye* standard is not applicable. *Jones*, 71 Wn.App. at 818.

Here, the State's intent was to elicit testimony as to Nurse Martin's own observations of a specific group based on her practical experience as a nurse, as approved of in *Jones*.

The Defendant incorrectly argued that, "the state is offering Ms. Martin to testify to something that is unnecessary for an expert to testify in order for the jury to appreciate the issue. Whether people are slow to report is a simple concept that juries can be expected to comprehend without expert assistance." Defendant's Motions in Limine at 2, CP 120-125. The case law clearly indicates otherwise. *State v. Stevens*, 58 Wash.App. 478, 496, 794 P.2d 38 (1990). *State v. Graham*, 59 Wash.App. 418, 423-24, 798 P.2d 314 (1990); *State v. Warren*, 165 Wash. 2d 17, 44 (2008) (holding that the prosecutor improperly argued facts not in evidence, discussing "the phenomenon of delayed disclosure" of sexual abuse, but noting that this line of argument would have been proper had the State offered some expert testimony at trial on the claimed phenomenon of delayed reporting of sexual abuse). See also *State v. Cleveland*, 58 Wash.App. 634, 646, 794 P.2d 546 (1990) (therapist's testimony regarding typical behaviors of child victims of sexual abuse was admissible to aid jury in evaluating victim's testimony).

The State did not expect there to be any evidence of trauma to the complainant. The purpose of the testimony regarding the infrequency of clinical findings was to explode the commonly held myth that rape victims always, or nearly always, have some type of empirical signs of trauma.

Ms. Martin's qualifications were that she was a Sexual Assault Nurse Examiner, and had undergone all of the necessary training to hold such a designation. In addition, she had considerable experience in conducting sexual assault examinations, having been a registered nurse for approximately 10 years, and having participated in numerous sexual assault examinations. A competent expert must possess such knowledge, skill, experience, training, or education as will assist the trier of fact. ER 702; *Colwell*, 104 Wn.App. at 612. A nurse may possess the education and skill to testify to the standard of nursing care. *Colwell*, 104 Wn.App. at 613. Moreover, "[p]ractical experience is sufficient to qualify a witness as an expert." *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). But the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness's area of expertise. *Farr-Lenzini*, 93 Wn.App. at 461 (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 103-04, 882 P.2d 703, 891 P.2d 718 (1994)).

Because the proffered testimony of Nurse Martin did not go beyond her area of expertise, and because such testimony would have been

helpful to the trier of fact without impermissibly invading the province of the jury, the Court should have allowed it. The court's ruling was made on untenable grounds because the court stated that it would only consider Nurse Martin's experience as a SANE nurse and expressly disregarded her 10 years of experience as a registered nurse, during which time she had participated in many sexual assault examinations. RP 3/29/20 at 39-40.

5. The court abused its discretion when it directed the prosecutor not to allow the victim advocate to escort the victim into the courtroom.

Crime victims have a constitutional right to attend court hearings. CONST. ART. I., § 35. They also have a statutory right to have a crime victim advocate present at judicial proceedings related to criminal acts committed against the victim. RCW 7.69.030(10). This right applies "if practical" and if the presence of the crime victim advocate does not cause any unnecessary delay in the investigation or prosecution of the case. *Id.* The role of the crime victim advocate is to provide emotional support to the crime victim. *Id.* The trial court abused its discretion when it did not allow the advocate to escort the victim into the courtroom.

The Appellant may argue that the State waived the issue by failing to object at trial, to which the State would reply that it was indeed remiss in failing to object, but that a prosecutor cannot waive a victim's right to have her advocate present with her at court by failing to object.

6. The court abused its discretion when it prevented the State from questioning Vivien Smith about her role in hiring an attorney for the Defendant for purposes of showing bias and attacking her credibility.

The Defendant's mother had assisted the Defendant with hiring attorney Jack Hill to represent the Defendant. RP 03/31/2010 at 25-26 *See also* 3/31/2010 at 49. Prior to cross-examining the Defendant's mother (Vivien Smith), the State asked the court for permission to question the witness about her involvement in hiring an attorney for Mr. Valdiviez in order to attack her credibility and for purposes of showing bias or interest. RP 03/31/2010 at 25-26. Defense counsel objected on the ground that what was being proposed is not proper cross-examination. *Id.* at 27. The court acknowledged that the hiring of an attorney could be evidence of bias. *Id.* at 29. The court nevertheless denied the motion. *Id.* at 31.

Vivien Smith's bias was crucial to the State's case since she was the only witness who provided any corroboration of Defendant's claims about R.M.'s misrepresentations as to age. By preventing the State from inquiring about her role in hiring an attorney for Mr. Valdiviez, the court unreasonably denied the State an opportunity to present valuable evidence that would help the jury to evaluate her credibility. Evidence of bias and interest is relevant to a witness's credibility. *State v. Whyde*, 30 Wash.App. 162, 632 P.2d 913 (1981). And the Defendant made no showing, and presented no argument, that the evidence would be prejudicial in any way.

E. CONCLUSION

The Court should affirm the Defendant's convictions for Rape of a Child in the Third Degree and Furnishing Intoxicating Liquor to a Minor. Appellant makes arguments on appeal, i.e., that questions should have been permitted for purposes of attacking credibility or for showing motive, that were never made at the trial level. Defense counsel never argued that his questions should be permitted under ER 608(b); and never once mentioned "impeachment" or "credibility" or "ER 608(b)" at trial.

Defendant's proposed questions, during the State's case-in-chief went beyond the scope of direct because the State never had questioned R.M. about any representations she had made with regard to her age. Defendant offered the questions for purposes of establishing his own affirmative defense, but did so during the State's case-in-chief, when he should have attempted to do so during the Defendant's case. The court properly refused to permit such questioning at this point in the trial.

Furthermore, Defendant never laid any satisfactory foundation showing that it was appropriate to question R.M. on the YouTube posting when it was never made clear that R.M. was actually the same person as Bella2234, and never established who it was that listed the poster's age as 19, or for that matter, how Exhibit K was created in the first place and where the information it contains came from. Defendant never asked the

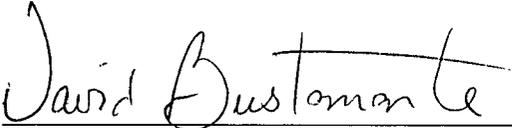
court to *voir dire* the witness outside the presence of the jury to establish such crucial facts. Had the Defendant laid the proper foundation for the admissibility of the YouTube evidence at the proper time in the trial, he could have attempted to introduce it during his own case-in-chief, or even during rebuttal; but he never tried to do this. The Defendant did not seek a final ruling from the court when the question was ripe.

And the court never said that the YouTube evidence could not come in at all. The court merely ruled that it could not come in during the cross-examination of R.M. during the State's case-in-chief, for the purposes proposed by the Defendant where the Defendant had not laid any foundation or made proper showing of relevance.

There was more than sufficient evidence to support the conviction for furnishing intoxicating liquor to a minor. Both convictions should be affirmed.

DATED this 1st day of July 2011

Respectfully submitted,
DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY

BY: 
DAVID BUSTAMANTE, WSBA #30668
Attorney for the Respondent

APPENDIX A
(Certificate of Service)

CERTIFICATE OF SERVICE

I, David Bustamante, do solemnly declare and affirm under penalty of perjury under the laws of the State of Washington that I served the subjoined Respondent/Cross-appellant's Opening Brief on the Counsel for William Valdiviez, Appellant/Cross-Respondent, this 5th day of July, 2011, by mailing a copy to James Lobsenz, 701 Fifth Avenue, Seattle, WA 98104. I also served the same on the Defendant this 5th day of July, 2011, by mailing a copy to William N. Valdiviez, c/o Vivien Smith, 8860 Heather Circle, Houston, TX 77055¹.

Signed at South Bend, Washington, this 5th day of July, 2011.

BY: David Bustamante
DAVID BUSTAMANTE
DECLARANT

11 JUL -6 AM 11:14
STATE OF WASHINGTON
BY [Signature]
JAMES LOBSENZ

¹ Substitute service is made upon Defendant's mother pursuant to declarations contained in defense counsel's Certificate of Substituted Service Upon Appellant's Mother, dated May 5, 2011, which documents Defendant's preference that service upon him be made in this manner.

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