

NO. 29963-5-III

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

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STATE OF WASHINGTON,

Respondent,

v.

S.B.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY, JUVENILE  
DIVISION

The Honorable John D. Knodell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

There is insufficient evidence to support appellant's conviction for minor in possession of liquor.

Issues Pertaining to Assignment of Error

1. Appellant was charged with possessing or consuming alcohol as a minor. Evidence an individual has ingested alcohol is insufficient to prove possession or consumption. So is mere proximity to alcohol. Where no one saw appellant hold or consume alcohol, and she did not admit to doing so, is the evidence insufficient to support her conviction?

2. No written trial findings or conclusions have been entered, but the trial judge made an oral ruling. Are several of the court's key oral findings erroneous because the trial evidence does not support them?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grant County Prosecutor's Office charged S.B. with one count of minor in possession of liquor, in violation of RCW 66.44.270(2)(a). CP 1. A defense motion to suppress evidence was denied. CP 10-17; RP 55-64. At a bench trial, the Honorable John D. Knodell found S.B. guilty. RP 174-176. She received a

standard range disposition and timely filed a Notice of Appeal. CP 21-22, 31.

2. Substantive Facts

At approximately 11:30 p.m. on August 9, 2010, Moses Lake Police Corporal Juan Loera responded to a disturbance call (loud music coming from a residence). RP 86-87, 92. Upon arriving at the residence, Corporal Loera attempted to contact someone inside. From the area of the front door, through an open window, Loera saw several people holding what appeared to be beer cans. RP 94-95. The group included males and females who appeared to be under the age of 21. RP 95, 107-108.

A male inside the home spoke to Loera through the open window, but refused to open the front door or provide information about whether there was a responsible adult inside. RP 94-96. Other officers arrived on scene and Loera cut across a side yard to meet them. As he did so, he could see – through additional open windows – alcohol containers on a table in the kitchen and what appeared to be additional juveniles “milling around.” RP 96-97. Loera contacted the male again by speaking with him through a side window. He expressed his opinion that there was a juvenile

party inside the home and indicated he would need to see everyone's identification. He was told to leave. RP 97-98.

Corporal Loera applied for, and obtained, a telephonic search warrant. RP 99. When he was still refused access to the home, officers used a battering ram to force entry. RP 100-101. Officers found multiple juveniles in the home and beer cans in the kitchen and in the kitchen garbage. RP 102-103, 106-107; exhibits 1-3. Most of the individuals inside the home were found standing in the kitchen, although some were found in the bedrooms. RP 104-105. After everyone was corralled in the kitchen, Loera interviewed each individual. RP 108-114.

S.B. provided her name and date of birth, which is February 2, 1995. RP 85, 114. According to Loera, he could smell "the sweet odor of alcohol" coming from her breath – but could not determine what type of alcohol – and noted that her eyes were bloodshot and watery. RP 114, 117. S.B. denied consuming alcohol. RP 124-125. Notably, Loera never saw S.B. with an alcoholic beverage in her hand. RP 126. Loera did not assess S.B., using field sobriety tests, to determine whether she was impaired, but concluded that she had consumed alcohol despite

her denial. RP 117-118. S.B. was taken home to her parents. RP 123.

There had been nine or ten individuals in the home. RP 118. In his report, Loera only listed two females – S.B. and another juvenile who did not smell of alcohol. RP 122-123, 128. But he initially testified there were three or four females in the home and conceded he may not have listed some females in his report because he had not recommended charges for them. RP 118, 126.

Judge Knodell found S.B. guilty. Among his oral findings, Judge Knodell found that Corporal Loera initially located S.B. in the kitchen, that S.B. had difficulty with balance, and that she exhibited “a nystagmus effect.” RP 174. Judge Knodell found the cases addressing this crime difficult to reconcile, but ultimately concluded that the evidence of recent ingestion, combined with S.B.’s proximity to the open alcohol containers, proved the crime beyond a reasonable doubt. RP 175-176. To date, no written findings and conclusions have been filed.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT S.B.'s  
CONVICTION FOR MINOR IN POSSESSION.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

RCW 66.44.270, the statute under which S.B. was charged, provides:

It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor. A violation of this subsection is a gross misdemeanor . . . .

RCW 66.44.270(2)(a).

Mere proximity to alcohol is insufficient to prove possession. State v. A.T.P.-R., 132 Wn. App. 181, 185, 130 P.3d 877 (2006).

Rather, case law establishes that a person possesses alcohol “if he or she knows of the substance’s presence, it is immediately accessible, and he or she exercises dominion and control over it.” A.T.P.-R., 132 Wn. App. at 185 (quoting State v. Dalton, 72 Wn. App. 674, 676, 865 P.2d 575 (1994)). Corporal Loera never saw S.B. actually possess, much less consume, any alcohol. RP 126.

Evidence one has already consumed alcohol does not satisfy the statute, either. State v. Hornaday, 105 Wn.2d 120, 126, 713 P.2d 71 (1986). “[T]he mere presence of alcohol in a person’s body does not establish possession or consumption, however, evidence of assimilation is circumstantial evidence of prior possession, which when combined with other evidence, may be sufficient to prove guilt beyond a reasonable doubt.” 32 Wash. Prac., Wash. DUI Practice Manual, § 13:6 (2010-11 ed.); see also Dalton, 72 Wn. App. at 676 (assimilation insufficient for conviction; need “other corroborating evidence of sufficient probative value”).

As an initial matter, Judge Knodell failed to enter written findings and conclusions. When a juvenile appeals a conviction, these findings are mandatory. JuCR 7.11 provides, in pertinent part:

**(c) Decision on the Record.** The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

**(d) Written Findings and Conclusions on Appeal.** The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

JuCR 7.11(c), (d).

Since these findings do not exist, Judge Knodell's oral decision is the only available basis for the verdict. And several of his oral findings fail for lack of evidentiary support. See Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (findings not supported by substantial evidence are erroneous). Judge Knodell found that Corporal Loera first discovered S.B. in the kitchen. RP 174. But there is no testimony to support this. While S.B. was eventually corralled in the kitchen with everyone else, she may have been in the bedroom initially.<sup>1</sup> See RP 104-105 (no indication

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<sup>1</sup> In response to a question from the court, Loera testified that S.B. was "one of the people in the kitchen," but this was during Loera's testimony that he individually interviewed everyone that had been

which individuals found where); RP 108 (everyone placed in kitchen). Judge Knodell also found that S.B. had difficulty with balance and exhibited signs of nystagmus. RP 174. There is nothing to support these findings, either. See RP 114, 128 (only evidence was odor of alcohol and bloodshot, watery eyes); RP 136 (prosecutor concedes no problem with balance and no indication of nystagmus).

Thus, at best, the State established that S.B. had the smell of an unidentified alcohol on her breath, she had red/watery eyes, and she was somewhere in a house where beer was available for consumption. She was not seen drinking or holding any beer. She denied consuming the beer. And she showed no other signs of intoxication. This evidence is insufficient.

S.B.'s case is similar to other cases in which the evidence was found insufficient. In State v. Roth, 131 Wn. App. 556, 128 P.3d 114 (2006), the defendant attended a party where no adult was present and alcohol was available to everyone. There was no evidence anyone has seen the defendant drinking alcohol or carrying it. But the defendant smelled of alcohol, appeared

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placed in the kitchen. See RP 112-114. There is nothing indicating Loera was testifying that S.B. was in the kitchen when officers first

intoxicated, and was visibly swaying as he walked. Id. at 559-560. Apparently because no one testified to seeing the defendant drinking at the party, the trial court found the evidence insufficient to demonstrate under the statute that he had actually consumed alcohol, but found that he had possessed it. Id. at 560. This Court reversed:

Having been found not guilty of having consumed alcohol, the connection between having access to alcohol and having availed oneself of that access is not present. Merely being in a room with a refrigerator full of beer, in another person's house, with no proof that the minor brought the beer or exercised dominion or control over the beer will not support a finding of constructive possession.

Id. at 565. Similarly, while there were some indications S.B. had consumed alcohol at some point, no one testified to seeing S.B. drinking or holding beer in the home. That she was found in general proximity to available alcohol is not sufficient.

In State v. A.T.P.-R., the defendant was convicted of minor in possession after a police officer smelled alcohol on him and found that his companion was carrying an open 40-ounce bottle of beer. A.T.P.-R., 132 Wn. App. at 183-184. Again, this Court reversed, finding that the defendant's proximity to the beer – even

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entered the home.

when coupled with the odor of alcohol coming from his body – was insufficient circumstantial evidence of possession. Id. at 185-186. Similarly, although S.B. smelled of alcohol and had bloodshot eyes, her general proximity to beer in the house is insufficient.

In State v. Francisco, 148 Wn. App. 168, 199 P.3d 478, review denied, 166 Wn.2d 1027 (2009), police found the defendant sleeping in a driveway. There was a strong odor of alcohol coming from the defendant, who was only able to offer a few incoherent responses to questions. He was so inebriated, he could not walk the short distance to his home. Id. at 173. This Court reversed the defendant's conviction, noting there were no alcohol containers found with him when he passed out – which would have been telling since he was the only one in the driveway – and he never confessed to possessing any alcohol. Id. at 175-176. S.B. did not confess, either. Compare State v. Walton, 67 Wn. App. 127, 131, 834 P.2d 624 (1992) (odor on breath and admission to consuming beer at party sufficient); State v. Preston, 66 Wn. App. 494, 499, 832 P.2d 513 (1992) (odor, admission to drinking, and testimony defendant placed empty beer bottles in trash sufficient), aff'd 122 Wn.2d 553 (1993). Nor was S.B. specifically linked to any of the

beer cans found in the home; there is no indication anyone saw her touch or hold any of them.

In finding S.B. guilty, Judge Knodell cited State v. Dalton, RP 175. Dalton was arrested at a “kegger” after police noted the strong odor of alcohol on his breath, his unsteadiness, slurred speech, and his bloodshot eyes. Dalton, 72 Wn. App. at 675, 677. Inside the house, police found a keg and cups of beer. And in contrast to S.B., the evidence affirmatively established that a police officer saw Dalton in close proximity to these items: Id. at 677. In S.B.’s case, she was found somewhere in the house – possibly in a bedroom – and no one testified to seeing her near any beer prior to the time everyone was corralled in the kitchen. Since general proximity to alcohol is insufficient to establish possession, this is a key distinction.

In short, because no one saw S.B. consume or possess alcohol, her general proximity to beer in the house and evidence that she consumed some type of alcohol before police arrived is insufficient to sustain her conviction.

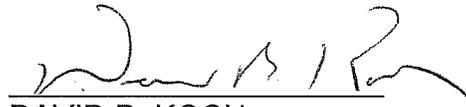
D. CONCLUSION

S.B.'s conviction should be vacated.

DATED this 26<sup>th</sup> day of September, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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State v. S.B.

No. 29963-5-III

Certificate of Service by email

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 26<sup>th</sup> day of September, 2011, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

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**Signed** in Seattle, Washington this 26<sup>th</sup> day of September 2011

X Patrick Mayovsky