

69447-2

69447-2

NO. 69447-2-I

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

REC'D

MAR 15 2013

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

V.S.,

Appellant.

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

The Honorable Wesley Saint Clair, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

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

2013 MAR 15 PM 4:39

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	1
C. <u>ARGUMENT</u>	3
THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR MINOR IN POSSESSION.....	3
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. A.T.P.-R.
132 Wn. App. 181, 130 P.3d 877 (2006).....3, 4

State v. Allen
63 Wn. App. 623, 821 P.2d 533 (1991).....4

State v. Dalton
72 Wn. App. 674, 865 P.2d 575 (1994).....4

State v. Duncan
146 Wn.2d 166, 43 P.3d 513 (2002).....4

State v. Francisco
148 Wn. App. 168, 199 P.3d 478
review denied, 166 Wn.2d 1027 (2009)4

State v. Green
94 Wn.2d 216, 616 P.2d 628 (1980).....3

State v. Hornaday
105 Wn.2d 120, 713 P.2d 71 (1986).....4

State v. Preston
66 Wn. App. 494, 832 P.2d 513
aff'd 122 Wn.2d 553 (1993)5

State v. Walton
67 Wn. App. 127, 834 P.2d 624 (1992).....5

FEDERAL CASES

In re Winship
397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....3

Jackson v. Virginia
443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).....3

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	2
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 66.44.270	1, 3

A. ASSIGNMENTS OF ERROR

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

2. The court erred in entering conclusions of law 2 and 3. CP 24 (Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d).

Issues Pertaining to Assignments of Error

Was the evidence insufficient to support appellant's conviction for minor in possession of liquor in violation of RCW 66.44.270(2)(a)?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged V.S. with one count of minor in possession of liquor in violation of RCW 66.44.270(2)(a). CP 18. Following a bench trial the Honorable Wesley Saint Clair found V.S. guilty as charged. RP 61-63; CP 22-24. V.S. was sentenced to two hours supervision and 16 hours of community restitution. CP 26-28.

2. Substantive Facts

On November 9, 2011, at approximately 8:00 p.m., officer John Stray of the Federal Way Police Department was working at a Dacatur High School girl's soccer game being played at the Federal Way Memorial Stadium. RP 15-17. Stray explained only one side of the stadium's entrance was opened. RP 20. V.S. and two other boys were

seen walking from the side of the stadium where the entrance was closed so Stray stopped them and arrested them for trespass. RP 20.

After Stray arrested V.S. and the other boys, he advised them of their Miranda¹ rights. RP 23-24. Stray then noticed V.S. smelled like stale liquor. RP 20-21. As Stray escorted V.S. and the others to a patrol car Stray told V.S. that he (V.S.) smelled alcohol and he asked V.S. what was going on. RP 34-35. The Decatur principal met them at the patrol car, and Stray again advised V.S. of his Miranda rights. RP 25. V.S. signed a waiver of rights form and gave a written statement. RP 27-28. V.S. admitted he jumped the fence to gain entrance to the stadium, and he admitted he drank one Miller beer. RP 30. V.S. was then released to his father. RP 32.

Stray testified V.S. was not stumbling and his speech was not slurred. RP 37. Stray did not see any alcohol on or near V.S. *Id.* Stray did not ask V.S. when V.S. had consumed the beer. RP 39.

The court entered written findings and fact and conclusions of law. CP 22-24. The court concluded V.S., who under twenty-one years of age, consumed alcohol and was guilty as charged. CP 24.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE
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).

The statute under which V.S. 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). A person possesses alcohol if he knows of the substance's presence, it is immediately accessible, and he 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)).

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). But evidence of assimilation is circumstantial evidence of prior possession and when combined with other corroborating evidence of sufficient probative value, alcohol consumption may support a conviction. Dalton, 72 Wn. App. at 676; State v. Duncan, 146 Wn.2d 166, 182 n.9, 43 P.3d 513 (2002).

In State v. Francisco, 148 Wn. App. 168, 199 P.3d 478, review denied, 166 Wn.2d 1027 (2009), police found the Francisco sleeping in a driveway. There was a strong odor of alcohol coming from him, and he was only able to offer a few incoherent responses to questions. Francisco was so inebriated he could not walk the short distance to his home. Id. at 173. The court reversed the conviction noting there was no corroborating evidence to prove possession. Id. at 175-176; see also, State v. Allen, 63 Wn. App. 623, 626, 821 P.2d 533 (1991) (evidence of intoxication without more does not support minor in consumption of liquor conviction); State v. A.T.P.-R., 132 Wn. App. at 185-86 (odor of alcohol on juvenile's body and proximity to an open bottle of beer is insufficient to sustain conviction).

Stray never saw V.S. actually possess or consume any alcohol. The evidence was insufficient to prove possession.

It is anticipated the State will argue, as it did at trial, that V.S.'s admission he drank one Miller beer coupled with the smell of alcohol on his breath is sufficient to establish consumption in violation of the statute. RP 49-50. An admission of consumption, however, must be accompanied by more than just the smell of alcohol to sustain a conviction.

In State v. Preston, 66 Wn. App. 494, 495, 499, 832 P.2d 513, aff'd 122 Wn.2d 553 (1993), for example, in addition to the odor of alcohol on Preston's breath, and Preston's admission he recently consumed beer, the arresting officer testified that he saw Preston put empty beer bottles in the trash receptacle. The court found the evidence sufficient to sustain a conviction under the consumption provision of the statute.

In State v. Walton, 67 Wn. App. 127, 131, 834 P.2d 624 (1992), while this Court noted the smell of alcohol on Walton's breath and his admission he consumed some beer was sufficient to prove consumption, the facts in that case also showed Walton was stopped leaving an underage party. Id. at 128, 131. This Court held the evidence was sufficient to support Walton's conviction. Id. at 131.

The State established that V.S. had the smell of unidentified alcohol on his breath, and he admitted he drank a beer. There was no

indication V.S. was intoxicated. V.S. was not stumbling, he did not exhibit slurred speech, and there was no other evidence of intoxication. Moreover, there was no evidence of V.S.'s proximity to any alcohol. Here, where there was the smell of stale alcohol on V.S.'s breath and his admission he consumed a beer at some time in the past, without more, the evidence was insufficient to sustain the conviction.

D. CONCLUSION

V.S.'s conviction should be reversed.

DATED this 15 day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant

