No. 71967-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jennifer Markwith,

Appellant.

Mason County Superior Court

Cause No. 12-1-00174-0

The Honorable Judge Amber L. Finlay

Appellant's Supplemental Brief

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SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

Angela Tecpile assaulted Jennifer Markwith on the property where they both lived. RP 159-60. Ms. Markwith called the police, who arrested Ms. Tecpile. RP 76, 119-20, 160. Later that day, Ms. Tecpile drove onto the property and saw Ms. Markwith in the driveway. RP 121, 162. Ms. Tecpile intentionally parked her car so that Ms. Markwith could not drive away. RP 69, 81, 107, 122, 162. Ms. Tecpile got out of her car and confronted Ms. Markwith. RP 81. She told Ms. Markwith that she would not let her leave until the police came.[1] RP 81.

Ms. Markwith got into her car and took the only exit route available by driving through a barbed-wire fence near the driveway. RP 82, 123, 125, 132 141, 162-63, 167. Ms. Tecpile said that Ms. Markwith drove in her direction and that she had to jump out of the way to avoid being hit by the car. RP 82.

Daniel Irwin, who also lived in the home, was standing nearby. RP 82, 103. The barbed wire from the fence dragged across the ground and caused Irwin to fall. RP 82, 103. Mr. Irwin cut his finger as a result. RP 103-04.

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[1] Ms. Tecpile believed that Ms. Markwith had stolen from her. RP 78.

The state charged Ms. Markwith with assault and reckless endangerment.[2] CP 19-20. In a discussion concerning jury instructions, the prosecutor agreed with the trial judge that both charges were based on "the same conduct." RP 189-190. The prosecutor described the conduct as "driving through the fence with both Ms. Tecpile and Mr. Irwin being in the immediate area." RP 190. He asserted that "the jury can find both or one was in danger." RP 190. Following this discussion, the prosecutor obtained permission to amend the Information to remove reference to either Tecpile or Irwin as the alleged victim of the reckless endangerment charge. RP 193-96. The Amended Information did not list any alleged victim of that charge. CP 19-20.

In closing, the prosecutor did not focus on any single person as the alleged victim of the reckless endangerment charge:

> There's a group of people there. There was Angela Tecpile, Daniel Irwin, and Yvonne Bell were all standing in that area. She drove toward them, engine roaring, high speed.

RP 224-25.

Ms. Markwith timely appealed, arguing, *inter alia*, that her convictions for both assault and reckless endangerment violated the constitutional protection against double jeopardy. *See* Appellant's Opening Brief, pp. 5-9.

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[2] This supplemental brief does not address the third charge, residential burglary.

The Court of Appeals requested supplemental briefing on the double jeopardy claim. Order Directing Supplemental Briefing on Limited Issue. The court asked the parties to discuss three cases.[3] The court also asked the parties to "include whatever remarks deemed necessary for this court to consider whether the 'same in law' prong of the double jeopardy test is satisfied in this case..." Order Directing Supplemental Briefing on Limited Issue.

ARGUMENT

MS. MARKWITH'S ASSAULT AND RECKLESS ENDANGERMENT CONVICTIONS VIOLATE DOUBLE JEOPARDY BECAUSE THEY ARE BASED ON THE SAME EVIDENCE.

A. Ms. Markwith's double jeopardy claim rests on an actual likelihood that jurors convicted her of assault and reckless endangerment based on the same conduct, not on a theoretical possibility flowing from the jury instructions.

Multiple convictions based on a single act violate double jeopardy if the evidence necessary to support a conviction for one offense is sufficient to support a conviction for another offense. *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004).

Here, the prosecution intentionally chose not to elect any particular person as the alleged victim of Ms. Markwith's reckless endangerment

[3] *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011); *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013); and *State v. Middleworth*, 179 Wn. App. 1025, 2014 *(continued)*

charge. RP 193-96, 224-25. Instead, the state argued that Ms. Markwith committed the offense by driving in the direction of a group of people. RP 224-25. Furthermore, Tecpile testified that she had to jump out of the way to avoid being hit by the car. RP 82. This evidence and the state's argument created a very real possibility that jurors based the reckless endangerment conviction on Ms. Markwith's conduct toward Tecpile.

The same conduct toward Tecpile provided the factual basis for the assault charge as well. CP 19, 42. Because the evidence necessary to support the assault charge was also sufficient to convict Ms. Markwith for reckless endangerment, the two convictions violate double jeopardy. *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004).

Ms. Markwith's case differs significantly from *Mutch*, and *Land.* In both *Mutch* and *Land,* the court failed to instruct jurors that each charge required proof of a separate and distinct act. *Mutch*, 171 Wn.2d at 663; *Land*, 172 Wn.2d at 601. The jury in each case might theoretically have returned more than one guilty verdict based on a single act. *Mutch*, 171 Wn.2d at 662; *Land*, 172 Wn.2d at 601.

However, in both *Mutch* and *Land*, the prosecution established a clear and separate factual predicate for each offense. *Mutch*, 171 Wn.2d at

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WL 470734 (2014). The court explicitly granted the parties permission to cite *Middleworth,* an unpublished case. Order Directing Supplemental Briefing on Limited Issue, p. 1.

662; *Land*, 172 Wn. App. at 601. The errors did not require reversal because each reviewing court found it manifestly clear that each conviction rested on a separate and distinct act. *Mutch*, 171 Wn.2d at 665-66; *Land*, 172 Wn.App at 603.

The court in *Mutch* disapproved of the defect in the instructions, but described the case as "a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent" that the jury convicted based on separate and distinct acts. *Mutch*, 171 Wn.2d at 665. Similarly, the *Land* court found that the "testimony, the prosecutor's arguments, the jury instructions, and the information made it manifestly apparent the State was not seeking to impose multiple punishments for the same offense." *Land*, 172 Wn. App. at 603.

Here, on the other hand, the risk of a double jeopardy violation stemmed from more than abstract speculation. The state actually proved only one act: that Ms. Markwith drove toward a group of people. As outlined above, it is likely that the jury convicted Ms. Markwith of reckless endangerment based on the risk her driving posed to Tecpile. This is exactly the same evidence used to convict her of assaulting Tecpile.

Furthermore, the prosecution deliberately removed any reference to an alleged victim, thus making it more likely the jury would convict

Ms. Markwith of reckless endangerment because of the danger to Tecpile.[4] The instructions did not make clear that jurors could only convict Ms. Markwith of reckless endangerment based on a separate and distinct act.[5] Furthermore, the prosecutor actually encouraged the jury to consider the risk to Tecpile in voting to convict Ms. Markwith of reckless endangerment. RP 224-225.

The evidence, argument, and jury instructions all encouraged the jury to convict Ms. Markwith of two different charges based on a single act. Ms. Markwith's case is not one of the "rare" situations in which the state can demonstrate that this error was harmless beyond a reasonable doubt. *Mutch*, 171 Wn.2d at 665.[6] The double jeopardy violation requires vacation of the reckless endangerment conviction. *Womac*, 160 Wn.2d at 660.

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[4] Originally, the Information listed Tecpile "and/or" Irwin as the alleged victim of the reckless endangerment charge. RP 193-96.

[5] If *Mutch* forecloses Ms. Markwith's double jeopardy claim, prosecutors would be encouraged to deliberately muddy the waters by proposing vague instruction of the type disapproved of by the *Mutch* court. *Mutch*, 171 Wn.2d at 663.

[6] The *Mutch* court declined to decide whether the case presented no error, or whether any error was harmless. *Mutch*, 171 Wn.2d at 664-665.

B. The *Blockburger* test does not require that two offenses share the same elements, only that they be based on the same evidence.

Convictions for two crimes can violate double jeopardy even if the two offenses do not have the same elements. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007); *Orange*, 152 Wn.2d at 820. Rather, two crimes constitute "the same offense" for double jeopardy purposes when proof of one necessarily constitutes proof of the other. *Womac*, 160 Wn.2d at 654-56. The inquiry focuses on the evidence produced to prove each offense, not on the elements of each offense. *Orange,* 152 Wn.2d at 818-820. Accordingly, the "same evidence" test for double jeopardy involves only one inquiry: whether the evidence necessary to convict for one offense was also sufficient to convict for the other. *Orange*, 152 Wn.2d at 816.

This analysis necessarily delves into the elements the state must prove for each offense as well as the actual evidence at trial. *Orange*, 152 Wn.2d at 818. Thus, the single query is sufficient to determine whether the two offenses are both the same "in law" and the same "in fact." *Id.*

Insofar as *Middleworth* holds otherwise, it conflicts with both *Orange* and *Womac* and was therefore wrongly decided. *See Middleworth*,

179 Wn. App. 1025.[7] The *Orange* court explicitly held that a court errs by analyzing a double jeopardy claim based only on the "statutory elements at their most abstract level." *Orange*, 152 Wn.2d at 817-18. Despite this, the *Middleworth* court rejected the defendant's double jeopardy claim, simply because one of the offenses was not a lesser included offense of the other. *Middleworth*, 179 Wn. App. 1025. *Middleworth* does not control Ms. Markwith's case. *Orange* and *Womac* do.

As outlined in Ms. Markwith's Opening Brief, her assault and reckless endangerment convictions rested on the same evidence involving a single act. RP 224-25. In order to find Ms. Markwith guilty of assault the jury had to find that she drove toward Tecpile in a manner that placed Tecpile in reasonable apprehension of bodily injury. Proof that Ms. Markwith deliberately drove her car toward Tecpile would also have been sufficient evidence for the jury to convict her of reckless endangerment. RCW 9A.36.050.

Conviction for both offenses violated the prohibition against double jeopardy. *Orange,* 152 Wn.2d at 816; *Womac*, 160 Wn.2d at 654-56. Ms. Markwith's reckless endangerment conviction must be vacated. *Womac*, 160 Wn.2d at 660.

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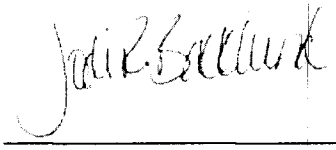
[7] As noted above, the Court of Appeals explicitly granted permission to discuss this unpublished opinion in supplemental briefing. Order Directing Supplemental Briefing on Limited Issue, p. 1.

CONCLUSION

For the reasons set forth above and in Ms. Markwith's Opening Brief, her convictions for both assault and reckless endangerment violated the constitutional protection against double jeopardy. Ms. Markwith's reckless endangerment conviction must be vacated.[8]

Respectfully submitted on August 20, 2014.

BACKLUND AND MISTRY



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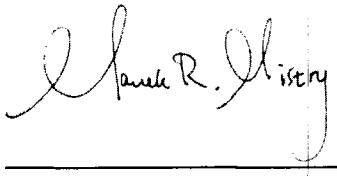

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[8] In earlier briefs, appellate counsel erroneously requested reversal of both convictions, rather than vacation of the lesser charge.

CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Jennifer Markwith
911 Arcadia Road
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecutor
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division I, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 20, 2014.

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August 20, 2014 - 9:33 AM

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