70711-6

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No. 70711-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREA RICH,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The State's closing argument that in order to believe Rich's testimony, the jury had to believe that all the other witnesses lied was prosecutorial misconduct that deprived Rich of her right to a fair trial, requiring reversal.

a. "Liar" arguments are improper.

The prosecutor argued during closing argument that in order to believe Rich's testimony, the jury had to believe that all the other witnesses lied. This was misconduct. The argument wrongfully implied that in order to find Rich not guilty, the jury had to find that the other witnesses were lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Case law to the contrary notwithstanding, the State maintains that there was no misconduct. The State argues Fleming and other cases are distinguishable. Br. of Resp't 13-14, 18. In essence, the State maintains there is a distinction between a prosecutor (1) arguing that the jury has to find the other witnesses lied in order to believe the defendant's testimony (as here) and (2) arguing that the jury has to find the other witnesses lied in order to acquit. Br. of Resp't at 13-14. The State argues only the latter form is improper. While the latter form explicitly conditions a not guilty verdict on finding that witnesses lied, the first form implicitly conveys the same message. It is also misconduct. State v. Wright, 76 Wn. App. 811,

826, 888 P.2d 1214 (1995) ("It is misconduct, however, for a prosecutor to argue that, in order to *believe* a defendant, a jury must find that the State's witnesses are *lying*."); State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying.") (emphasis added). The question is whether the State proved the charge beyond a reasonable doubt, not whether witnesses lied. Wright, 76 Wn. App. at 825.

The State characterizes Wright's language on what qualifies as misconduct as dicta. Br. of Resp't at 18. In Wright, the prosecutor argued during closing that in order to believe the defendant, the jury would have to believe that the officers "got it wrong." Id. at 823. This Court held this was not misconduct. Id. at 826. The Court reasoned that it is improper to argue that the jury would have to believe that the other witnesses were lying in order to accept the defendant's testimony. Id. It was not misconduct, however, to argue that in order to believe a defendant, the jury must find that the State's witnesses are mistaken. Id. The Court's discussion about what constituted misconduct was essential to Wright's holding that the prosecutor had not committed misconduct. It was not dicta. See Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) ("A statement is dicta when it is not

necessary to the court's decision in a case."), rev. denied, 178 Wn.2d 1022. Even if dicta, the Court's analysis is persuasive and should be followed.

b. The flagrant and ill-intentioned misconduct could not have been cured by an admonition to the jury.

The prosecutor's argument was flagrant and ill-intentioned. See Fleming, 83 Wn. App. at 213-14. In support of its argument that the argument was not flagrant, the State cites State v. Wheless, 103 Wn. App. 749, 14 P.3d 184 (2000). Br. of App. at 19. There, this Court reversed the defendant's conviction based on an unlawful search. Id. at 758. This Court then cursorily discussed the appellant's pro se argument that the prosecutor erred in stating that the jury had to find that police officers lied in order find the defendant innocent. Id. Noting that the pro se argument had not been developed, the Court disposed of the claim by concluding that a curative instruction could have cured any prejudice. Id. The context of the prosecutor's statement is unclear. Id. This makes it impossible to fairly compare to this case.

Here, the context shows that the State's inappropriate argument was built upon a false theme that Rich, through her testimony, called the other witnesses liars. Before making the plainly inappropriate argument,

the prosecutor misrepresented Rich's testimony, stating that Rich had testified that all the other witnesses fabricated everything:

> Now, the defendant can testify. And she told a totally different story. She said that the car owner – and all of the officers testified, Deputy Mulligan, Deputy Copeland – they just made it all up, everything they said was a fabrication, and only she is telling you the truth.

RP 223-24. Rich, however, did not testify that the witnesses fabricated everything and that only she was telling the truth. RP 184-208.

Thus, when viewed in the totality, the misconduct had an indelible effect that could not have been cured through an instruction. See State v. Sargent, 40 Wn. App. 340, 345, 698 P.2d 598 (1985); Fleming, 83 Wn. App. at 214-17; Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citation omitted). This Court should review the error.

c. The misconduct was prejudicial.

There is a substantial chance that the misconduct affected the verdict. Rich's defense to the DUI and reckless endangerment charges were that she had not driven the car. The State's inappropriate argument struck at the heart of her defense. A jury may be wary to conclude that officer witnesses are lying. State v. Casteneda-Perez, 61 Wn. App. 354,

360, 810 P.2d 74 (1991). It is for precisely this reason that prosecutors use the inappropriate tactic of presenting the jury with a false choice of either finding that the law enforcement officers lied or convicting the defendant. See id.

The State conflates the charge of possession of a stolen vehicle, which the jury acquitted Rich of, and the other two charges. Br. of Resp't at 22. The possession of a stolen vehicle charge turned largely on the car owner's testimony and Rich's testimony. The owner, who was married, denied knowing Rich. RP 92, 95. The State, however, did not recall the owner to testify after Rich testified that she knew the owner, had gone out with him, and that he had let her borrow the car. RP 185-87. Given the owner's natural motive to deny that he had an affair, the jury found reasonable doubt. In contrast, the other two charges turned on whether the jury accepted testimony from law enforcement that Rich had been driving the car. The prosecutor gave the jury a false choice of either finding that the law enforcement officers were lying or convicting Rich. Absent the prosecutorial misconduct, the jury might have acquitted Rich.

Based on the prosecutorial misconduct, this Court should reverse and remand for a new trial.

2. The prosecutor's "missing witness" argument, incorrectly permitted by the trial court, was improper and prejudicial.

a. This issue is properly before this Court.

Despite Rich's opposition to a missing witness instruction below, the State contends that Rich did not preserve the issue of whether it was proper for the State to make a missing witness argument. Br. of Resp't at 23. Rich argued that the missing witness doctrine was inapplicable. RP 211. The court agreed, but inexplicably ruled that the State could still make a missing witness argument during closing. RP 211. While Rich did not lodge another objection, this should not preclude review. In analyzing whether the missing witness doctrine applies, the appellate courts have yet to distinguish between whether the doctrine was raised during closing or in an instruction. Compare State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991) (doctrine raised during closing argument) with State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) (doctrine invoked through jury instruction). Thus, an objection to a missing witness instruction should be sufficient. See State v. Fisher, 165 Wn.2d 727, 748 n.4, 202 P.3d 937 (2009) (opposition to ER 404(b) evidence during pretrial ruling sufficient to preserve issue on whether State committed misconduct during closing argument by referring to 404(b) evidence). Further, an objection during closing argument would have been futile

because the court had already ruled on the issue. RP 212. No curative instruction would have been provided. It would have only highlighted the State's argument for the jury.

Regardless, this Court may review the issue as one of manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Dixon, 150 Wn. App. 46, 57-59, 207 P.3d 459 (2009) (reviewing missing witness issue under RAP 2.5(a)(3) and reversing). Here, the prosecutor's missing witness argument infringed on the constitutional presumption of innocence and the constitutional requirement that the State bear the entire burden of proof. See Dixon, 150 Wn. App. at 57. The prosecutor's argument prejudiced Rich because it suggested that she had an obligation to produce witnesses and evidence. See id. at 58. Thus, this Court may properly review the issue regardless of whether it was properly preserved.

b. A ruling that the missing witness doctrine does not apply logically means that the doctrine cannot be raised during closing argument.

The trial court determined that the missing witness doctrine was inapplicable and on that basis, denied the State's request for a missing witness instruction. Nevertheless, the court inexplicably allowed the State to make a missing witness argument during closing. This circle cannot be squared. A determination that the doctrine is inapplicable logically precludes both an instruction and argument.

As the State points out, in Cheatam, the trial court did not allow a missing witness instruction, but permitted the State to invoke the doctrine during closing argument. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The opinion does not say that the trial court found the missing witness doctrine inapplicable, as the trial court did here. See id. Accordingly, Cheatam does not establish that a prosecutor's missing witness argument is proper when the trial court determines the requirements for the doctrine are not met.

c. The missing witness doctrine was inapplicable.

For the missing witness doctrine to apply, the absent witness must be "peculiarly" or "particularly" available to one party. Blair, 117 Wn.2d at 491; Montgomery, 163 Wn.2d at 598. In other words, the absent witness must be under the party's control rather than being equally available. Id. As the trial court determined, this requirement was not met. RP 211-12. While the witnesses may have been related to Rich, the evidence did not establish they were under her control. Neither Blair nor Cheatam supports the State's argument to the contrary.

In Blair, the police found what the State believed was a ledger recounting drug transactions. Blair, 117 Wn.2d at 482. The ledger had first names and phone numbers. Id. The defendant testified that the list represented loans and gambling debts. Id. at 483. The defendant called

one person on the list to testify, but not anyone else on the list. Id. The Court held that the prosecutor's missing witness argument was proper. The Court reasoned that the peculiarly available requirement was met because the defendant was the only person who could reasonably determine who the people on the list were; the defendant testified he could have located the people on the list; and the defendant testified he had a business relationship with the people on the list. Id. at 490-91.

In Cheatam, the defendant raised an alibi defense. 150 Wn.2d at 632. The defendant called his Aunt, whom he worked for, to testify. Id. at 653. The Aunt testified that one of her workers probably called the defendant at home on the day in question to wake him for work. Id. This supported the defendant's alibi. Id. The defense did not call the co-worker to testify. The Court held that the co-worker was peculiarly available to the defense. Id. at 655.

Blair and Cheatam do not establish that the trial court erred in determining that the absent witnesses were not under Rich's control. Unlike Blair, there was no showing that Rich had a business relationship with the witnesses or that only she knew the witnesses' last names. And unlike Cheatam, the defendant there had called his employer to testify but had not called his co-worker to testify. Here, only Rich testified. If Rich had called one of her relatives but not the other, then Cheatam might be

analogous. Further, there was no showing that the State could not have called Rich's relatives.

The State argues that the use of the missing witness doctrine in this case was in accord with its rationale. See Br. of Resp't at 30-31. True, a prosecutor should be able to challenge the defendant's argument that absent witnesses or evidence supports the defendant's theory of the case. See Br. of Resp't at 31 (citing State v. Contreras, 57 Wn. App. 471, 476, 788 P.3d 1114 (1990)). The prosecutor, however, had the ability to challenge Rich's theory without resorting to the inapplicable missing witness doctrine. The State could have recalled the police officers who arrested Rich to rebut her testimony that other people saw that she only got into the car when police arrived. The State chose not to. RP 210.

d. The error was prejudicial.

The error was prejudicial. Based on the prosecutor's improper missing witness argument, the jury likely rejected Rich's testimony that she had not been driving the car. Absent the error, the jury might have accepted Rich's account rather than the State's. Accordingly, the error had a substantial effect and cannot properly be deemed harmless. See Montgomery, 163 Wn.2d at 600 (erroneous giving of missing witness instruction was not harmless in light competing interpretations of the evidence and the prosecutor's references to the absent witnesses).

3. Because the evidence did not show that Rich's actual driving was erratic or dangerous, insufficient evidence supports the reckless endangerment conviction.

Reckless endangerment through the driving of a motor vehicle requires evidence the driving was dangerous or reckless. See State v. Potter, 31 Wn. App. 883, 888, 645 P.2d 60 (1982) ("proof of reckless endangerment through use of an automobile will always establish reckless driving."); State v. Graham, 153 Wn.2d 400, 403, 103 P.3d 1238 (2005) (evidence of dangerous driving sufficient to sustain convictions for reckless endangerment). While there was evidence that Rich was intoxicated and that she had exceeded the posted speed limit, there was no evidence that her actual driving was erratic, unusual, or dangerous. To the contrary, Deputy Mulligan testified that he saw Rich drive about four blocks and park at an apartment complex without incident. RP 78. After she parked, he detained her not because her driving was dangerous, but because the car was reportedly stolen. RP 75, 78. Because the evidence did not show that Rich's driving created a substantial risk of death or serious physical injury to another person, this Court should reverse the reckless endangerment conviction for lack of sufficient evidence.

This analysis is consistent with precedent. For example, in City of Bellevue v. Redlack, this Court reasoned that driving while intoxicated does not automatically make a person guilty of negligent driving and that

absent any evidence of actual negligent operation of a motor vehicle, prosecution for negligent driving was not available:

> [W]e cannot say that every driver convicted of DWI will automatically be guilty of negligent driving. An officer may observe a vehicle being driven without any indication of negligent operation but may stop that vehicle for an infraction such as a defective taillight. If the officer then detects an odor of alcohol and other behavioral characteristics of the driver indicating that the driver is under the influence of intoxicants, the driver may be charged with DWI. Under these circumstances, the only prosecution available is on a charge of DWI without an additional charge of negligent driving since there is no proof that negligent driving has actually occurred.

City of Bellevue v. Redlack, 40 Wn. App. 689, 697-98, 700 P.2d 363 (1985). See also State v. Amurri, 51 Wn. App. 262, 265, 753 P.2d 540 (1988) ("Driving an automobile under the influence of intoxicants does not, in and of itself, constitute reckless driving."). Under this analysis, Rich could not properly be prosecuted for negligent driving, which requires proof that the defendant operated the vehicle in such a manner as to endanger or likely to endanger any person or property. See Redlack, 40 Wn. App. at 693; RCW 46.61.525. It follows that without evidence that Rich's driving was actually dangerous, the reckless endangerment conviction cannot be sustained.

The State minimizes the cases cited by Rich, contending they have no bearing because some of them do not involve a charge for reckless

endangerment. See Br. of Resp't at 37. The principles established in these cases, which all concern related crimes committed through the use of a motor vehicle, are relevant.

The State's account of Amurri is incomplete. Br. of Resp't at 39. There, this Court held there was sufficient evidence to sustain a reckless driving conviction. Amurri, 51 Wn. App. at 263. Contrary to the State's representations, the defendant there, a 15 year-old boy, did more than speed and drive intoxicated. Id. He "exceeded the speed limit while passing a vehicle on the right, on a wet, narrow, gravel shoulder." Id. at 267. This scenario is not analogous.

While the evidence showed that Rich was impaired and that she slightly exceeded the speed limit, the evidence did not establish that she actually drove the car in a dangerous manner. Accordingly, the State failed to meet its burden that Rich created a substantial risk of death or serious injury to another person, i.e., reckless endangerment. This Court should reverse the conviction and order it dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

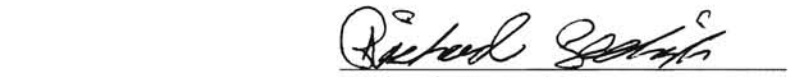
B. CONCLUSION

The reckless endangerment conviction should be dismissed with prejudice for lack of sufficient evidence. The driving under the influence

conviction should be reversed and the case remanded for a new trial because prosecutorial misconduct deprived Rich of a fair trial.

DATED this 9th day of July, 2014.

Respectfully submitted,



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DIVISION ONE

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	)	
Respondent,	)	
	)	NO. 70711-6-I
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	)	
ANDREA RICH,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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