No. 44461-5-II

COURT OF APPEALS, DIVISION II
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 Reply Brief

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I. THE ASSAULT AND RECKLESS ENDANGERMENT CONVICTIONS VIOLATE DOUBLE JEOPARDY UNDER THE *BLOCKBURGER* "SAME EVIDENCE" TEST.

A. Both convictions rest on the "same evidence."

The *Blockburger*[1] "same evidence" test applies to double jeopardy questions. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007). A court may not enter multiple convictions when the evidence necessary to convict on one crime also proves the second crime.[2] *In re Orange*, 152 Wn.2d 795, 815-816, 100 P.3d 291 (2004).

Here, the evidence proving assault also proved reckless endangerment. *See* Appellant's Opening Brief, pp. 5-9. Both convictions were based on the same act of driving. RP 223-225.

To prove assault, the state convinced jurors that Ms. Markwith intentionally drove toward Tecpile. RP 223-225. The state relied on this same evidence to show that she acted recklessly for the reckless endangerment charge. RP 223-225.

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[1] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[2] Respondent does not claim that the legislature has given a clear indication of a contrary intent in this case. *See Womac*, 160 Wn.2d at 652.

The guilty verdict on the assault necessarily reflects a finding that Tecpile had a reasonable apprehension and imminent fear of bodily injury. CP 38, 40, 41. When attacked with a car, a person who reasonably fears imminent bodily injury necessarily suffers a substantial risk of serious physical injury, if not of death. Accordingly, in this case, the evidence establishing Tecpile's reasonable apprehension and imminent fear of bodily injury also proves a substantial risk of death or serious physical injury.

The evidence necessary to convict Ms. Markwith of assault also proved reckless endangerment. *Orange,* 152 Wn.2d at 816. Conviction of both offenses thus violated double jeopardy. *Id.*

B. Respondent misreads the record and misunderstands the "same evidence" test.

1. The jury's verdict does not rest on proof of two separate acts.

Respondent erroneously suggests that the two convictions involved two separate acts. Brief of Respondent, pp. 8-10. According to Respondent, "each crime involved different victims." Brief of Respondent, p. 11. Respondent argues that Ms. Markwith first assaulted Tecpile (by driving toward her) and then endangered Irwin (by recklessly dragging the barbed wire fence behind her car). Brief of Respondent, pp. 8-10.

The record does not support Respondent's assertions. In fact, steps taken by the prosecutor at trial foreclose the argument Respondent now attempts to make on appeal.

First, 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.

Second, the prosecutor obtained permission to amend the Information. The amendment removed a reference to Tecpile "and/or" Irwin in the paragraph charging reckless endangerment.[3] RP 193-96; CP 20.

Third, the prosecutor's closing argument fit this theory. As Respondent notes, the prosecutor argued "that Markwith committed the crime of reckless endangerment because she 'drove the car right toward a group of people, which included Bell, Irwin, and Angela [Tecpile]." Brief of Respondent, p. 10 (quoting RP 224). After mentioning a minor injury to Irwin's finger, the prosecutor went on to argue that

[3] Counts one and two both named Tecpile as the victim; after amendment, the reckless endangerment charge referred only to "a substantial risk of death or serious physical injury to another person." CP 20.

> [T]here was a risk of a lot more serious injury there. She could have caused incredible damage to a lot of people. She could have caused serious physical injury to several people by doing what she did…
> RP 225.

Fourth, the court's instructions conformed to the state's theory.[4] The assault instructions required jurors to find that Ms. Markwith assaulted Tecpile, specifically. The reckless endangerment instructions directed jurors to determine only whether or not she endangered "another person." CP 42, 46.

The jury did not return a special verdict finding that Ms. Markwith endangered Irwin.[5] Accordingly, both convictions may have been based on her assaulting and endangering Tecpile. Under these circumstances, the two convictions rested on the "same evidence." *Orange,* 152 Wn.2d at 820; *State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 4, 304 P.3d 906 (2013).

The convictions for assault and reckless endangerment violated double jeopardy. *Orange,* 152 Wn.2d at 820. The convictions must be reversed.

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[4] The instructions were proposed by the prosecutor.

[5] Or some other person besides Tecpile.

2. Two convictions can violate the "same evidence" test even if each crime requires proof of an element not required by the other.

The "same evidence" test requires more than a mechanical comparison of "statutory elements at their most abstract level." *Orange,* 152 Wn.2d at 817-818. Instead, a court must examine the crimes "as charged and proved." *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

Thus, for example, convictions for attempted murder and first-degree assault may violate double jeopardy under appropriate facts. *Orange,* 152 Wn.2d at 818-820. This is so even though each crime requires proof of elements not required by the other.[6]

The *Blockburger* test examines the evidence, not the elements. *Id.* A reviewing court must "determine 'whether each provision *requires proof of a fact which the other does not.*'" *Id.,* at 818 (emphasis in original) (quoting *Blockburger,* 284 U.S. at 304).

Respondent makes the mistake highlighted by the Supreme Court in *Orange.* Respondent claims the two offenses are distinct because "each crime required proof of an element not required by the other." Brief of

[6] The state must prove intent to kill for attempted murder. It need not prove intent to kill for a conviction of first-degree assault. On the other hand, the state must prove actual use of a firearm, deadly weapon, or other deadly force for a first-degree assault conviction. Attempted murder can be proved in ways that do not involve firearms, weapons, or other deadly force. *See* RCW 9A.36.011; RCW 9A.32.030; RCW 9A.28.020.

Respondent, p. 11. Respondent erroneously compares the "statutory elements at their most abstract level." *Orange,* 152 Wn.2d at 818. Respondent fails to examine the offenses "as charged and proved" at trial. *Freeman,* 153 Wn.2d at 777.

Here, the two crimes are identical "as charged and proved." *Freeman,* 153 Wn.2d at 777. The same evidence supported Ms. Markwith's convictions for reckless endangerment and second-degree assault. The two convictions violate the constitutional protection against double jeopardy. *Id.* Ms. Markwith's convictions must be reversed. *Id.* at 821.

II. THE COURT'S NONSTANDARD REASONABLE DOUBT INSTRUCTION RELIEVED THE STATE OF ITS BURDEN OF PROOF.

Ms. Markwith rests on the argument set forth in her Opening Brief.[7]

III. MS. MARKWITH'S CONVICTIONS WERE IMPROPERLY BASED ON EVIDENCE THAT SHE HAS A VIOLENT DISPOSITION

A. The jury used propensity evidence to convict Ms. Markwith.

Due process prohibits conviction based on propensity evidence. *See* Appellant's Opening Brief, pp. 13-20 (citing, *inter alia, Garceau v.*

[7] The Supreme Court will hear a petition for review raising this issue in February of 2014.

Woodford, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003)). Ms. Markwith's convictions were based in part on propensity evidence. The evidence suggested she had a predisposition toward violence. RP 110, 116, 134-135, 171-172. The jury instructions and the prosecutor's arguments encouraged conviction based on this predisposition. CP 25; RP 220. This violated her right to due process. *Garceau,* 275 F.3d 769.

B. The state fails to provide substantive argument addressing Ms. Markwith's due process claim.

Respondent does not address the merits of Ms. Markwith's argument. Instead, Respondent notes that Washington courts need not follow *Garceau.* Brief of Respondent, pp. 17-18. This is true; however, the federal courts of appeal can provide guidance as Washington Courts interpret the Fourteenth Amendment's due process clause.

Furthermore, the absence of controlling precedent does not obviate the need to decide constitutional issues properly raised on appeal. Respondent does not present any authority establishing that the state can constitutionally use propensity evidence to establish guilt. Brief of Respondent, pp. 17-18. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

The error here is a manifest error affecting a constitutional right. It may be raised for the first time on review. RAP 2.5(a)(3). In her opening brief, Ms. Markwith argued that the improper propensity evidence, combined with the court's instructions and the prosecutor's argument, had "practical and identifiable consequences at trial." Appellant's Opening Brief, p. 15. Respondent suggests that the error is not "manifest." Brief of Respondent, p. 19.

Respondent provides no argument to support this claim.[8] Brief of Respondent, p. 19. Instead, after outlining the standards for determining whether or not error qualifies as manifest, Respondent asserts (without citation to authority) that Ms. Markwith "has not shown actual error." Brief of Respondent, p. 19.

C. The error is not harmless.

Ms. Markwith asserts a due process violation. The court must therefore apply the stringent constitutional standard for harmless error. The prosecution must show that the error was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

[8] Nor does Respondent argue that the court should decline to exercise its power to review the issue as a matter of discretion. *See* Appellant's Opening Brief, p. 13 n. 7.

Respondent erroneously seeks to apply the more relaxed standard for non-constitutional error. Brief of Respondent, pp. 20-21. Even if this were the correct standard, Ms. Markwith would prevail. Contrary to Respondent's assertion, the error caused prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The court's instructions directed jurors to rely on all the evidence relating to a proposition. CP 23. The prosecutor used the evidence as propensity evidence in closing. RP 220. It is reasonably probable that the error materially affected the outcome. *Neal,* 144 Wn.2d at 611.

Ms. Markwith's convictions must be reversed and the case remanded for a new trial. *Id.*

IV. THE COURT ERRED BY DENYING MS. MARKWITH'S MOTION TO EXCLUDE EVIDENCE OF UNCHARGED MISCONDUCT.

Ms. Markwith rests on the argument set forth in her opening brief.

V. MS. MARKWITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Ms. Markwith rests on the argument set forth in the opening brief.

VI. IMPROPER COMMENTS ON MS. MARKWITH'S EXERCISE OF HER RIGHT TO REMAIN SILENT VIOLATED HER PRIVILEGE AGAINST SELF-INCRIMINATION AND HER RIGHT TO DUE PROCESS.

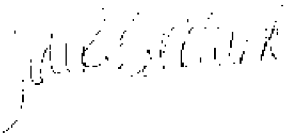
Ms. Markwith rests on the argument set forth in her opening brief.

CONCLUSION

Ms. Markwith was denied a fair trial. Her convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on December 30, 2013,

BACKLUND AND MISTRY



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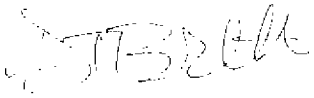

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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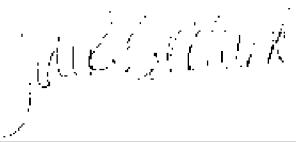
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timw@co.mason.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, 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 December 30, 2013.



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