No. 70711-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

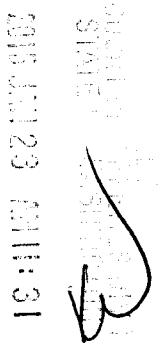
STATE OF WASHINGTON,

Respondent,

v.

ANDREA RICH,

Appellant.



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

APPELLANT'S RESPONSE TO STATE'S SUPPLEMENTAL BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

Pennslyvania Cases

Statutes

A. ARGUMENT

Because the evidence did not prove Ms. Rich's driving created a substantial risk of death or serious physical injury, the evidence was insufficient to find her guilty of reckless endangerment.

Per the "to-convict" instruction, to find Andrea Rich guilty of reckless endangerment, the State had to prove beyond a reasonable doubt that (1) Ms. Rich acted recklessly and (2) that her reckless conduct created a substantial risk of death or serious physical injury to another person. CP 40. Relatedly, the jury was instructed that a "person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that death or serious injury may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP 41. In citing to this latter instruction, the State erroneously quotes the statute, RCW 9A.08.010(1)(c), not the instruction. Supp. Br. at 2.

Evidence is sufficient to support a determination of guilt only if a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). Here, the reckless endangerment conviction was premised on Ms. Rich's driving of a car. The evidence, however, did not prove that Ms. Rich's driving created a

substantial risk of death or serious physical injury to another person. Similarly, the evidence did not prove that Ms. Rich disregarded a substantial risk that death or serious physical injury might occur through her driving.

As argued, reckless endangerment through the driving of a motor vehicle requires evidence the driving was dangerous. See State v. Graham, 153 Wn.2d 400, 403, 103 P.3d 1238 (2005) (evidence of dangerous driving sufficient to sustain convictions for reckless endangerment); 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."). Otherwise, there is not a substantial risk of death or serious physical injury. This position is supported by a Pennsylvania case, Commonwealth of Pennsylvania v. Mastromatteo, 719 A.2d 1081 (Pa. Super. Ct. 1998).

In Mastromatteo, the defendant was convicted of driving under the influence and reckless endangerment. Mastromatteo, 719 A.2d at 1081. After a domestic quarrel with her husband, the defendant was stopped by police. Mastromatteo, 719 A.2d at 1082. A call had been placed to the police and the defendant was observed drifting over the middle lane of the road she was driving on. Mastromatteo, 719 A.2d at 1082. In the defendant's car was her young son and a glass of alcohol. Mastromatteo,

719 A.2d at 1082. The defendant appeared intoxicated. Mastromatteo, 719 A.2d at 1082. She failed sobriety tests. Mastromatteo, 719 A.2d at 1082. Chemical tests showed she had a .168 blood alcohol level and 570 nanograms per deciliter for marijuana. Mastromatteo, 719 A.2d at 1082.

Interpreting ~~Applying~~ a reckless endangerment statute substantially similar to Washington's,[1] the court held that the evidence was insufficient to support the reckless endangerment conviction. Mastromatteo, 719 A.2d at 1082. The court concluded that driving under the influence was not necessarily reckless and held that evidence of intoxication "must be accompanied with other tangible indicia of unsafe driving":

> [D]riving under the influence of intoxicating substances does not create legal recklessness *per se* but must be accompanied with other tangible indicia of unsafe driving to a degree that creates a substantial risk of injury which is consciously disregarded. Whether, in this context, the unsafe driving results from diminished judgment, a more cavalier approach to driving or sheer physical incapacitation would seem immaterial, as is the degree to which any of these factors is actually related to the consumption of alcohol or drugs. What is material is actual reckless driving or conduct, for any reason, for it is this conduct which creates the peril in question. Since people

[1] Under Pennsylvania law, one "recklessly endangers another person 'if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.'" Mastromatteo, 719 A.2d at 1083 (quoting 18 Pa. C.S.A. § 2705)). Under Pennsylvania's "criminal code, one acts 'recklessly with respect to a material element of an offense when he consciously disregards a **substantial** and unjustifiable risk that the material element . . . will result from his conduct.'" Mastromatteo, 719 A.2d at 1083 (quoting 18 Pa. C.S.A. § 302(b)(3)).

> vary in their response to alcohol we believe this is a sound principle.

Mastromatteo, 719 A.2d at 1083 (emphasis added). The court rejected the notion that driving while legally intoxicated necessarily creates a substantial risk of death or serious bodily injury. Mastromatteo, 719 A.2d at 1084.

In reaching this result, the court reasoned that while intoxicated drivers are more likely to get into an accident than if sober, the odds of getting into an accident and causing injury is still remote. Mastromatteo, 719 A.2d at 1084. Thus, merely driving while intoxicated does not create the necessary substantial risk of death or serious bodily injury. Mastromatteo, 719 A.2d at 1084. The court accordingly reversed the defendant's conviction. Mastromatteo, 719 A.2d at 1084.

Pennsylvania has adhered to this rule requiring "tangible indicia of unsafe driving." In another case, the defendant got high, drove his vehicle with his three young daughters inside, and got into an accident after having failing to negotiate a left turn. Commonwealth of Pennsylvania v. Hutchins, 42 A.3d 302, 312 (2012). Nevertheless, the court reversed the three convictions for reckless endangerment. Hutchins, 42 A.3d at 312. The court reasoned that unlike in other cases, where defendants aggressively weaved through traffic or drove the wrong way on an off

ramp, the defendant was not observed to have acted recklessly. Hutchins, 42 A.3d at 312.

The rule adopted in Pennsylvania is substantially the one advocated for by Ms. Rich in her briefing, which is that there must be evidence of actual dangerous driving, not just driving while intoxicated. Here, that evidence was lacking. The only other criticism of Ms. Rich's driving was that she slightly exceeded the speed limit of 35 miles per hour. There was no testimony, however, that this was dangerous or even unusual. As common experience tells us, drivers often exceed the speed limit without creating a substantial risk of death or serious physical injury. The law also recognizes that speeding is not necessarily reckless. See State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997).

Perhaps realizing the lack of evidence tending to show that Ms. Rich drove unsafely, the State focuses on the evidence that Ms. Rich was intoxicated. Supp. Br. at 3-5. While the standard of review views the evidence in the light most favorable to the State, the State exaggerates this evidence. Supp. Br at 4-5. Officer Jon Liefson testified that Ms. Rich's intoxication was not "extreme," only that it was "obvious." RP 120. Ms. Rich was able to communicate. 5/28/13RP 113, 118, 147. While Ms. Rich's coordination was recounted as poor, one of her legs was in a cast or walking boot and appeared to be broken. 5/28/13RP 80-81, 110, 117.

Moreover, contrary to the State's account, Officer Liefson did not testify that Ms. Rich was unable to pick up a piece of paper; he merely recounted that Ms. Rich had a "hard time" "attempting to get pieces of paper" for him. 5/28/13RP 117. Ms. Rich also did not have a blood alcohol level of .20, as the State asserts. Supp. Br. at 4. The two samples indicated a blood alcohol level of .183 and .188. 5/28/13RP 177.

In sum, the evidence did not show that Ms. Rich's level of intoxication was extreme. Her level was about the same as the woman in Mastromatteo, who was also under the influence of marijuana. Mastromatteo, 719 A.2d at 1082. Neither was there evidence that Ms. Rich's driving was dangerous.

B. CONCLUSION

The evidence that Ms. Rich drove while intoxicated and slightly exceeded the speed limit was insufficient to prove that she created a substantial risk of death or serious physical injury. Thus, the evidence failed to prove that she was reckless or that her conduct created a substantial risk of death or serious physical injury. This Court should reverse the conviction and order it dismissed with prejudice.

DATED this 22nd day of January, 2015.

Respectfully submitted,

Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. ANDREA RICH, Appellant.	)))))))))	NO. 70711-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **APPELLANT'S RESPONSE BRIEF TO STATE'S SUPPLEMENTAL BRIEF** 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:

[X] NAMI KIM, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] ANDREA RICH 8424 DELRIDGE WAY SW APT 103 SEATTLE, WA 98106	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JANUARY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710