

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 02, 2015, 4:07 pm
BY RONALD R. CARPENTER
CLERK

E

No. 91623-3

RECEIVED BY E-MAIL

kyh

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ANDREA RICH,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

RICHARD W. LECHICH
Attorney for Respondent

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

 ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 5

The evidence was insufficient to prove that Ms. Rich committed the offense of reckless endangerment beyond a reasonable doubt. 5

1. The State bears the burden to prove all the elements of the offense beyond a reasonable doubt. 5

2. Reckless endangerment requires proof that the defendant created a *substantial* risk of death or serious physical injury to another person. 6

3. The evidence did not prove beyond a reasonable doubt that Ms. Rich’s driving created a substantial risk of death or serious physical injury to another person. 7

a. A substantial risk is one that is considerable, not remote..... 7

b. The State was required to prove that Ms. Rich’s driving created a substantial risk. 7

c. The evidence presented did not prove that Ms. Rich’s driving while intoxicated created a considerable risk to others. 8

d. Evidence of possible moderate speeding did not prove a substantial risk..... 13

e. Other circumstances did not tend to prove a substantial risk..... 14

D. CONCLUSION 14

TABLE OF AUTHORITIES

United States Supreme Court Cases

Begay v. United States, 553 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008)..... 9, 10

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 5

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 5

Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)..... 9

Washington Supreme Court Cases

State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005)..... 7

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 5

State v. McKague, 172 Wn.2d 802, 262 P.3d 1225 (2011) 7

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997) 13

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 6

Washington Court of Appeals Cases

City of Bellevue v. Redlack, 40 Wn. App. 689, 700 P.2d 363 (1985) 8

State v. Amurri, 51 Wn. App. 262, 753 P.2d 540 (1988) 8

State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982) 7

State v. Rich, 186 Wn. App. 632, 347 P.3d 72 (2015) 4, 7, 8, 14

Other Cases

Commonwealth of Pennsylvania v. Mastromatteo, 719 A.2d 1081 (Pa. Super. Ct. 1998)..... 11, 12

Constitutional Provisions

Const. art. I, § 3..... 5
U.S. Const. amend. XIV 5

Statutes

18 U.S.C. § 924(e)(2)(B)(ii) 9
RCW 9A.08.010(1)(c) 6
RCW 9A.36.050(1)..... 6

A. INTRODUCTION

Stopped during daylight hours solely on suspicion that she was in possession of a stolen vehicle, police found Ms. Rich in the driver's seat intoxicated with her young nephew in the passenger's seat. After charging Ms. Rich with possession of a stolen vehicle and driving while under the influence, the prosecutor added a charge for reckless endangerment shortly before trial. Acquitted of the stolen vehicle charge, Ms. Rich was convicted of the other charges and appealed. Because the State failed to prove beyond a reasonable doubt that Ms. Rich's driving created a *substantial* risk of serious physical injury or death to another person, the Court of Appeals correctly reversed the conviction for reckless endangerment. There was no evidence that Ms. Rich's driving was erratic or unusual. Her level of intoxication was not extreme. She was able to walk, waive her rights and answer questions, and submit to a breathalyzer. The State offered no statistical evidence on the relationship between drunk driving and accidents. This Court should hold the State to its burden of proof and affirm.

B. STATEMENT OF THE CASE

King County Sheriff's Deputy Paul Mulligan testified he was on afternoon patrol on May 27, 2012. RP 72-74. Around 8 p.m., while it was still light outside, Deputy Mulligan heard on his radio that Seattle police

had located a stolen vehicle, but then lost it. RP 74, 84, 89. As Deputy Mulligan was driving southbound on Ambaum Boulevard in Burien, he saw a car pass him in the outside lane near 122nd Street. RP 74-75. He identified the car as the reported stolen vehicle. RP 75. Without activating his lights or sirens, Deputy Mulligan pulled behind the car and followed, accelerating to about 50 miles per hour to catch up. RP 75, 78. Deputy Mulligan did not testify what the precise speed limit was, only that “it was about 35 through that area.” RP 75. After traveling about four blocks, the car pulled into an apartment complex and stopped. RP 78.

Police arrested Andrea Rich, who was in the driver’s seat of the car. RP 80, 145. Based on their interaction with her, the officers suspected that Ms. Rich was intoxicated. RP 80, 146. Ms. Rich’s nephew, a boy appearing to be around nine years old, was in the front passenger’s seat. RP 144, 198.¹ There was no evidence that the boy had not been wearing his seatbelt.

Ms. Rich, who had a cast or walking boot on her leg, did not undergo a field sobriety test. RP 80, 110, 119. However, she was able to walk, agreed to answer questions, and submitted to a breathalyzer. RP 113, 146, 169. Two breath test samples, taken after Ms. Rich was in custody, indicated that Ms. Rich had a blood alcohol level of .183 and

¹ The boy’s precise age was not established.

.188. RP 177. A police officer testified that Ms. Rich's level of intoxication appeared only to be obvious, not extreme. RP 120.

The State did not initially charge Ms. Rich with reckless endangerment. Rather, the State charged her with possession of a stolen vehicle and driving under the influence. CP 1-5. A few months before trial, the State added a charge for reckless endangerment. CP 6-7.

During closing, the prosecutor² argued that the State had proved reckless endangerment because Ms. Rich had driven while intoxicated with a person in the front passenger seat. RP 222. Without supporting evidence, the prosecutor conclusorily asserted there is a "high risk of accident when people are driving drunk." RP 222. She referred the jury not to evidence, but to a discussion "during voir dire" to support her argument. RP 222.³ The prosecutor also argued it was dangerous to have

² There were two prosecutors in the case. RP 1, 5. The prosecutor who conducted this closing appears to have been participating in the King County Prosecutor's trial fellowship program. RP 1, 5.

³ As the court properly instructed, the evidence was the testimony and the exhibits, not the remarks from the lawyers:

The lawyers' remarks, statements, and argument are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 23.

a child ride in the front seat rather than the back, but there was no evidence presented to support this argument either. RP 223. The prosecutor then engaged in misconduct by arguing that the jury had to believe that all the witnesses besides Ms. Rich were lying to return a not guilty verdict. RP 223-24, 227; State v. Rich, 186 Wn. App. 632, 648-50, 347 P.3d 72 (2015).

The jury acquitted Ms. Rich of the stolen vehicle charge, but convicted her of driving under the influence. CP 47-48. Likely because of the prosecutor's improper arguments, the jury also found Ms. Rich guilty of reckless endangerment. CP 49.

Recognizing that the State had not proved with sufficient evidence the offense of reckless endangerment beyond a reasonable a doubt, the Court of Appeals reversed that conviction. Rich, 186 Wn. App. at 636. This Court granted the State's petition for review on whether the evidence was sufficient to prove reckless endangerment beyond a reasonable doubt.

C. ARGUMENT

The evidence was insufficient to prove that Ms. Rich committed the offense of reckless endangerment beyond a reasonable doubt.

1. The State bears the burden to prove all the elements of the offense beyond a reasonable doubt.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The beyond a reasonable doubt standard is designed to impress “upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.” Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). It “symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” Id.

In reviewing whether the State has met this burden, the appellate court analyzes “whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson, 443 U.S. at 319). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A “modicum” of evidence does not meet this standard. Jackson, 443 U.S. at 320.

2. Reckless endangerment requires proof that the defendant created a *substantial* risk of death or serious physical injury to another person.

“A person is guilty of reckless endangerment when he or she recklessly engages in conduct . . . that creates a substantial risk of death or serious physical injury to another person.” RCW 9A.36.050(1).⁴ “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c).⁵ Thus, the offense requires proof that the defendant’s conduct created a substantial risk of serious physical injury or death to another person and that the defendant knowingly disregarded this risk when a reasonable person would not ignore it. Here, the State failed to prove that Ms. Rich’s conduct created a substantial risk of serious physical injury or death to another person.

⁴ Per the “to-convict” instruction, to find Ms. Rich guilty of reckless endangerment, the State had to prove beyond a reasonable doubt (1) that on or about May 28, 2012, Ms. Rich acted recklessly; (2) that her reckless conduct created a substantial risk of death or serious physical injury to another person; and (3) that this act occurred in Washington State. CP 40.

⁵ 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.

3. The evidence did not prove beyond a reasonable doubt that Ms. Rich’s driving created a substantial risk of death or serious physical injury to another person.

a. A substantial risk is one that is considerable, not remote.

The State bore the burden to prove not simply that Ms. Rich created a risk, but that she created a *substantial* risk of serious physical injury or death. As the Court of Appeals recognized, the key word is “substantial.” Rich, 186 Wn. App. at 647. The ordinary meaning of “substantial” is “considerable in amount, value, or worth.” State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (quoting Webster's Third New International Dictionary 2280 (2002)). Thus, the risk posed by Ms. Rich’s driving had to be “considerable,” not remote.

b. The State was required to prove that Ms. Rich’s driving created a substantial risk.

To prove this crime, the State had to prove that Ms. Rich’s driving of the motor vehicle created a substantial risk of serious physical injury or death to another person. 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.”). The State

attempted to do this primarily through evidence of Ms. Rich's intoxication, not through evidence of dangerous driving.

Merely proving that a person has driven while intoxicated does not necessarily show that their driving is dangerous. For example, Washington courts have already recognized that driving while intoxicated does not necessarily establish the crimes of reckless or negligent driving. See 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.”); City of Bellevue v. Redlack, 40 Wn. App. 689, 694, 700 P.2d 363 (1985) (while proof of intoxication is required to establish DUI, “such proof alone does not warrant a conviction for negligent driving”). While these crimes have different elements, they indicate that merely driving while intoxicated is inadequate to create a substantial risk of death or serious physical injury to another person. Rich, 186 Wn. App. at 644.

c. The evidence presented did not prove that Ms. Rich's driving while intoxicated created a considerable risk to others.

As noted by the Court of Appeals, there was no evidence about how Ms. Rich's level of intoxication specifically affected her driving. Id. at 643. The toxicologist only testified in generalities about how alcohol can affect a person. RP 132-33.

Importantly, the State did not present any statistical evidence to substantiate its bare assertion during closing argument that driving drunk creates a high risk of accident causing serious physical injury or death. While one might intuitively think that driving drunk necessarily creates such a risk, this intuition is questionable, as caselaw indicates.

For example, Justice Scalia's concurring opinion in Begay v. United States is instructive. There, the Supreme Court held that driving under the influence of alcohol was not a "violent felony" within the meaning of the Armed Career Criminal Act. Begay v. United States, 553 U.S. 137, 140, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008). The statute defined "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).⁶

Justice Scalia, in his concurring opinion, reasoned that drunk driving did not qualify because, based on the evidence, he could not conclude that drunk driving posed at least as serious a risk of physical injury as burglary does, which was the least risky of the enumerated crimes. Begay, 553 U.S. at 153 (Scalia, J., concurring). Justice Scalia

⁶ The Supreme Court has recently adopted Justice Scalia's view that the residual clause of this act is unconstitutionally vague in violation of due process. Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015).

then explained that the fact that drunk drivers kill many people actually says very little about whether a single act of drunk driving creates a serious risk of physical injury to another:

The Government cites the fact that in 2006, 17,062 persons died from alcohol-related car crashes, and that 15,121 of those deaths involved drivers with blood-alcohol concentrations of 0.08 or higher. See Brief for United States 17. Drunk driving is surely a national problem of great concern. But the fact that it kills many people each year tells us very little about whether a single act of drunk driving “involves conduct that presents a serious potential risk of physical injury to another.” It may well be that an even greater number of deaths occurs annually to pedestrians crossing the street; but that hardly means that crossing the street presents a serious potential risk of injury. Where the issue is “risk,” the annual number of injuries from an activity must be compared with the annual incidents of the activity. Otherwise drunk driving could be said to pose a more serious risk of physical harm than murder. In addition, drunk driving is a combination of two activities: (1) drinking and (2) driving. If driving alone results in injury in a certain percentage of cases, it could hardly be said that the entirety of the risk posed by drunk driving can be attributed to the combination. And finally, injuries to the drunk drivers themselves must be excluded from the calculus, because the statute counts only injuries to other persons.

Needless to say, we do not have these relevant statistics.

Id. at 153-54. While this analysis was written for a different context, the analysis is on point here. It shows that one cannot simply assume (as the prosecutor asked the jury to do) that driving while under the influence necessarily creates a substantial risk of serious physical injury or death to

another person. Rather, there must be actual evidence proving a substantial risk.

Pennsylvania courts have reached this conclusion. In Mastromatteo, the defendant was convicted of driving under the influence and reckless endangerment. Commonwealth of Pennsylvania v. Mastromatteo, 719 A.2d 1081 (Pa. Super. Ct. 1998). 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. Id. In the defendant's car was her young son and a glass of alcohol. Id. The defendant appeared intoxicated. Id. She failed sobriety tests. Id. Chemical tests showed she had a .168 blood alcohol level and 570 nanograms per deciliter for marijuana. Id.

Interpreting a reckless endangerment statute substantially similar to Washington's,⁷ the court held that the evidence was insufficient to support the reckless endangerment conviction. Id. The court concluded that driving under the influence was not necessarily reckless and held that

⁷ 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.'" Id. at 1083 (quoting 18 Pa. C.S.A. § 302(b)(3)).

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.

Id. at 1083. The court rejected the notion that driving while legally intoxicated necessarily creates a substantial risk of death or serious bodily injury. Id. at 1084. Even when a person drives while intoxicated, the odds of getting into an accident and causing injury will, in general, be remote.

Id.

As Mastromatteo and Justice Scalia’s concurring opinion in Begay show, driving under the influence does not necessarily create a substantial risk of death or serious physical injury.

One can certainly imagine a case where the defendant was so intoxicated that it might be reasonable to infer a substantial risk from the defendant’s driving. But this is not that case. Ms. Rich, although intoxicated, was not incapacitated. She was able to walk, waive her rights

and answer questions, and submit to a breathalyzer. RP 113, 146, 169.

While Ms. Rich's blood alcohol level was over the legal limit, there was no evidence that this manifested itself in her driving. There was no evidence that she had swerved or driven erratically.

d. Evidence of possible moderate speeding did not prove a substantial risk.

The only criticism of Ms. Rich's driving was she may have been speeding. This Court, however, has recognized that speeding is not necessarily reckless. See State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997). Moreover, only one officer testified about Ms. Rich's driving and he did not indicate that Ms. Rich's driving posed any danger. He only testified that the speed limit was about 35 miles per hour in the area and that he accelerated to around 50 miles per hour to catch up to Ms. Rich, who had passed him. RP 75. Thus Ms. Rich must have been driving at less than 50 miles per hour. The officer followed Ms. Rich for about four blocks before she safely parked. RP 78, 85. The officer did not testify that he suspected Ms. Rich was intoxicated based on her driving. Ms. Rich was detained when she parked solely because police suspected she was in a stolen vehicle. The Court of Appeals correctly concluded that Ms. Rich's speed did not create a substantial risk of death or serious physical injury. Rich, 186 Wn. App. 644.

e. Other circumstances did not tend to prove a substantial risk.

Other circumstances that might tend to show the creation of a substantial risk are lacking. For example, Ms. Rich drove when it was light outside, not when it was dark. There was no evidence that traffic conditions were poor. There was no evidence that the weather was bad. And there was no evidence that Ms. Rich's nephew was not secured with a seatbelt. While the prosecutor argued that Ms. Rich's nephew should have been in the backseat rather than the front, there was no evidence presented to the jury that children should ride in the back seat. RP 223. Thus, the lack of other evidence bolsters the conclusion that the evidence was insufficient to prove a substantial risk.

D. CONCLUSION

The evidence of Ms. Rich's driving while intoxicated and of possible moderate speeding was insufficient to prove beyond a reasonable doubt that she created a substantial risk of death or serious physical injury to another person. The Court of Appeals' well-reasoned opinion should be affirmed.

DATED this 2nd day of October, 2015.

Respectfully submitted,

s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Respondent

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 91623-3**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- petitioner James Whisman, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[Jim.Whisman@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
- respondent
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 2, 2015

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: Jim.Whisman@kingcounty.gov; paoappellateunitmail@kingcounty.gov; Richard Lechich
Subject: RE: 916233-RICH-SUPPLEMENTAL BRIEF

Received on 10-02-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Friday, October 02, 2015 4:03 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jim.Whisman@kingcounty.gov; paoappellateunitmail@kingcounty.gov; Richard Lechich <richard@washapp.org>
Subject: 916233-RICH-SUPPLEMENTAL BRIEF

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Respondent

Richard W. Lechich - WSBA #43296
Attorney for Respondent
Phone: (206) 587-2711
E-mail: richard@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.