IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ANDREA RICH,

Respondent/Cross-Petitioner.

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

ANSWER TO STATE'S PETITION FOR DISCRETIONARY REVIEW AND CROSS-PETITION

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A. INTRODUCTION

This case involves an ordinary question concerning the sufficiency of the evidence: Did the State fail to prove beyond a reasonable doubt that Ms. Rich committed the offense of reckless endangerment through her driving of an automobile while intoxicated? Given the lack of evidence that Ms. Rich's driving was actually dangerous or of how her level of intoxication affected her driving, the Court of Appeals correctly held the State had not met its burden to prove that Ms. Rich had created a *substantial* risk of death or serious injury to the passenger in her car. The State does not argue that this decision is in conflict with precedent or that it involves a significant constitutional question. Rather, the State asserts this case presents an issue of substantial public interest because it involves an issue related to drunk driving. Because the State fails to substantiate this claim, this Court should deny review. If this Court accepts review, the Court should also review an issue of prosecutorial misconduct.

B. ISSUES FOR REVIEW

1. Reckless endangerment requires proof that the defendant acted recklessly and that this reckless conduct created a *substantial* risk of death or serious physical injury. At trial, no evidence showed that Ms. Rich's driving appeared to be unusual or dangerous. She was not stopped for suspicion of driving under the influence. While there was evidence that

Ms. Rich had driven while under the influence, this evidence did not establish that any impairment was so great that her driving would have created the necessary substantial risk. Given the dearth of evidence, did the State fail to prove beyond a reasonable doubt that Ms. Rich's driving created a substantial risk of death or serious physical injury to the passenger in the car?

2. It is flagrant and ill-intentioned misconduct for a prosecutor to argue that in order to believe the defendant or to acquit, the jury must find that other witnesses are lying. Ms. Rich testified that she had not been driving before being arrested. During closing, the prosecutor misrepresented Ms. Rich's testimony and argued, "You heard the defendant. You have to believe that all the other witnesses came in here and lied." The Court of Appeals properly held the prosecutor's argument was misconduct. Still, cases to the contrary notwithstanding, the Court of Appeals held Ms. Rich waived the issue by not objecting. If this Court grants review, should this Court also review this issue of prosecutorial misconduct because of the conflict in the precedent? RAP 13.4(b)(2).

C. 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 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 activing 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. Deputy Mulligan stopped about 20 feet behind the car, activated his emergency lights, and waited for backup. RP 78, 85.

After two other police officers arrived, the officers 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. Before arresting her, the police claimed to have overheard Ms. Rich telling the passenger in the car, a boy appearing to be about eight or nine years old, to say that they found the keys and had just got in the car. RP 79, 144-45.

Officer Samuel Copeland, one of the backup officers, testified that Ms. Rich told him that her boyfriend, Mohamed, had given her the keys to the car about a week ago. RP 147. Ms. Rich, who had a cast on her leg,

did not undergo a field sobriety test. RP 80, 119. Two breath test samples, taken after Ms. Rich was taken into custody, indicated that Ms. Rich had a blood alcohol level of .183 and .188. RP 177.

The State initially charged Ms. Rich with possession of a stolen vehicle and driving under the influence. CP 1-5. The State later amended the information to add a count of reckless endangerment. CP 6-7.

Ms. Rich testified that she had not been driving and that police arrived as she was entering the parked car after leaving her sister's apartment. RP 190, 199. Ms. Rich did not testify that other witnesses were fabricating events. RP 184-208. Still, the prosecutor argued that Ms. Rich had so testified and that the jury would have to believe that all the other witnesses were lying. RP 223-24, 227. The jury acquitted Ms. Rich of the stolen vehicle charge, but convicted her of driving under the influence and reckless endangerment. CP 47-49.

On appeal, Ms. Rich argued that the prosecutor engaged in misconduct during closing argument, that the prosecutor had been permitted to make an improper missing witness argument, and that the evidence was insufficient to establish reckless endangerment. State v. Rich, No. 70711-6-I, 2015 WL 1305780 (Mar. 23, 2015). Though agreeing the prosecutor had committed misconduct, the Court of Appeals held Ms. Rich's first two arguments were waived. Rich, slip op. at 17-19.

The Court of Appeals, however, agreed that the State had not proved Ms. Rich guilty of reckless endangerment beyond a reasonable doubt. Rich, slip op. at 17-19.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. This case does not involve an issue of substantial public interest. Rather, it involves an ordinary and correct application of the sufficiency of the evidence standard to the offense of reckless endangerment. Accordingly, this Court should deny review.

The State does not argue that the Court of Appeals decision in this case conflicts with precedent or that it involves a significant constitutional question. The State only argues that this case presents an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4); Pet. at 7-8. The State's argument in support of its position is that "appropriate enforcement of DUI laws is a matter of substantial public interest." Pet. at 7. The offense of reckless endangerment, RCW 9A.36.050(1), however, is not a part of the driving under the influence laws or the motor vehicle code. See chapter 46.61 RCW. Moreover, as the Court of Appeals recognized, the "facts cited by the State are largely taken into account in assessing the appropriate sentence for DUI." Rich, slip op. at 8 n.1. The Court of Appeals also affirmed Ms. Rich's conviction for driving under the influence. This case simply does not raise

an issue related to enforcement of Washington's driving under the influence laws.

Underlying the State's superficial argument that this case presents an issue of substantial public importance, is a mere rehash of the arguments made below. The State's real contention is that the Court of Appeals got it wrong and that this Court should overrule it. However, mere disagreement with the Court of Appeals does not justify this Court's review. RAP 13.4(b) (stating that this Court will accept review "only" on the four grounds listed). Regardless, the Court of Appeals got it right.

To find Ms. 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 ("to-convict" instruction); RCW 9A.76.160(1). 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; see RCW 9A.08.010(1)(c).

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 a car. As the Court of Appeals recognized, the evidence did not prove that Ms. Rich's driving created a *substantial* risk of death or serious physical injury to another person. Rich, slip op. at 14-15.

The State does not fairly recount the opinion. The State incorrectly represents that the Court of Appeals held that a person cannot be found to have recklessly endangered a passenger while driving intoxicated. See Pet. at 9 ("There is nothing in this statutory language that forbids finding reckless endangerment where a person drives" intoxicated with a passenger.). This is not what the Court of Appeals held. The Court of Appeals held that given the lack of evidence as to how Ms. Rich's driving posed any risk or how Ms. Rich's level of intoxication affected her driving, the State failed to meet its burden to prove that Ms. Rich had created a substantial risk of death or serious physical injury to the passenger in her car:

> The State did not present evidence from which the trier of fact could infer that Rich's driving created a risk of death or serious physical injury that was considerable or substantial. No witness testified that Rich's driving specifically posed any risk or discussed generally the risk of accident, death, or injury. The toxicologist was not asked about, and did not explain, the effects of Rich's specific level of intoxication. The evidence that Rich was under the influence of alcohol was not sufficient to allow

> the jury to conclude that her driving created the level of risk necessary to support a reckless endangerment conviction.

Rich, slip op. at 14-15.[1] Thus, unlike this case, a case with evidence of poor or dangerous driving, or evidence explaining how a person's driving was affected by his or her level of intoxication, would be materially distinguishable from this case.

Next, the State's representation of the Court of Appeals' interpretation of State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005) is inaccurate. The Court of Appeals merely cited to Graham to support the proposition that, "The reckless endangerment statute proscribes only endangering conduct that places another person at substantial risk." Rich, slip op. at 8 (citing Graham, 153 Wn.2d at 406). Contrary to the State's representation, the Court of Appeals did not read Graham to restrict the State's ability to charge defendants. Pet. at 10; Rich, slip op. at 8-9. Neither did the Court reason that Graham dictated the result in this case. Pet. at 10; Rich, slip op. at 8-9.

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[1] The State incorrectly represents that the reasoning of the Court of Appeals in the opinion supporting reversal arose for the first time during oral argument. Pet. at 7 n.4. Ms. Rich, however, argued in both her opening and reply briefs that the evidence was insufficient because the State had failed to prove the substantial risk element. Br. of App. at 15-20; Reply Br. at 11-13. The prosecutor for the State, apparently feeling that she had not answered the panel's questions adequately at oral argument, submitted supplemental briefing and moved for the Court to accept the briefing. After the Court granted the State's motion, Ms. Rich filed additional briefing on the topic as well.

In evaluating whether the requisite risk of harm was supported by the evidence, the Court of Appeals properly focused on the word "substantial." This meant that the risk had to be "considerable," not merely hypothetical or conjectural. Rich, slip op. at 11, 14. The State's contention that the Court of Appeals elevated the proof required to prove a substantial risk is baseless. Pet. at 11.

As recounted by the Court of Appeals, and ignored by the State, 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 and are not controlling, they inform a proper construction of the reckless endangerment statute. Rich, slip op. at 11. It would be inconsistent if driving while under the influence was sufficient to prove a substantial risk

of death or serious physical injury to a passenger, but the same driving did not also qualify as negligent or reckless driving.[2]

The State makes much from the fact that the Court of Appeals' analysis is supported by a sister state's jurisprudence. To illustrate that merely driving while intoxicated does not necessarily create a substantial risk of death or serious physical injury, the Court of Appeals cited a case from Pennsylvania: Commonwealth of Pennsylvania v. Mastromatteo, 719 A.2d 1081 (Pa. Super. Ct. 1998). There, in a case with substantially similar evidence and law, the Pennsylvania court held the evidence was insufficient to convict an intoxicated driver of reckless endangerment. The court rejected the State's argument that the evidence of the driver's mere intoxication was adequate alone. Mastromatteo, 719 A.2d at 1082.

Rather than being a reason for granting review, Mastromatteo shows that the Court of Appeals' analysis is sound. In any event, contrary to the State's argument, the Court of Appeals did not adopt Mastromatteo or even rely on the opinion significantly. See Rich, slip op. at 11-12.

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[2] "Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving." RCW 46.61.500.

Negligent driving is set out at RCW 46.61.5249 and RCW 46.61.525. "Negligent" means "the failure to exercise ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances." RCW 46.61.5249(2)(a); RCW 46.61.525(2).

Though the State argues otherwise, the Court of Appeals did not adopt any "rule" from Mastromatteo or Pennsylvania. Pet. at 14.

Finally, the Court of Appeals faithfully applied the standard of review used in sufficiency of the evidence challenges. Excluding Ms. Rich's intoxication, the State's only criticism of Ms. Rich's driving was that she may have briefly exceeded the speed limit. See RP 214 (State's closing argument). This criticism was based on Deputy Mulligan's testimony that "it was about 35 [miles per hour] through that area" and that he had to accelerate to about 50 miles per hour to catch up to Ms. Rich. RP 75. Deputy Mulligan then testified that he followed Ms. Rich for about four blocks before she parked at an apartment complex. RP 78, 85. He did not testify about his rate of speed while he followed Ms. Rich.

Neither Deputy Mulligan nor any other witness testified that Ms. Rich's rate of speed, which must have been less than 50 miles per hour, 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. This Court has recognized that speeding is not necessarily reckless. See State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997). Further, if Ms. Rich's rate of speed had actually been dangerous, it seems unlikely that Deputy Mulligan would have accelerated

to about 50 miles per hour, in order to catch up, without activating his emergency lights and sirens first. RP 75, 78.

As for Ms. Rich's intoxication, the testimony was only that it was "obvious," not extreme. RP 120. Moreover, the toxicologist only testified in general how alcohol affects a person, not how Ms. Rich herself would have been affected by her blood alcohol level. RP 132-33. As discussed, Washington courts already recognize that merely driving under the influence does not make one guilty of reckless or negligent driving. Here, the State needed to do more than merely prove that Ms. Rich drove while under the influence to establish that her driving created a substantial risk of death or serious physical injury.

The State wrongfully claims that the Court of Appeals altered the standard for proving reckless endangerment and misapplied the standard of review in sufficiency challenges. Pet. at 17. The Court of Appeals correctly held the evidence was insufficient to prove reckless endangerment. Because this case does not involve an issue of substantial public concern, this Court should deny review.

2. The Court of Appeals correctly recognized the prosecutor committed misconduct during closing argument. Yet, contrary to other cases, the Court held this misconduct did not justify reversal because Ms. Rich did not object. If review is granted, this Court should also review this issue given the conflict in the precedent.

During closing argument, the prosecutor misrepresented Ms. Rich's testimony, contending that she had testified that police 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. The prosecutor then argued that to believe Ms. Rich or to acquit, the jury had to accept Ms. Rich's "preposterous" testimony and believe that all the witnesses called by the State "lied":

> She gave a preposterous story. You heard the defendant. You have to believe that all the other witnesses came in here and lied.

RP 227.

The Court of Appeals correctly held the prosecutor's argument was misconduct because "[t]his type of argument misrepresents the role of the jury and the burden of proof by telling jurors they must decide who is telling the truth and who is lying before deciding if the State has met its burden of proof." Rich, slip. op. at 16 (citing State v. Fleming, 83 Wn.

App. 209, 213, 921 P.2d 1076 (1996); State v. Wright, 76 Wn. App. 811, 825-26, 888 P.2d 1214 (1995)). The Court of Appeals also correctly recognized that this "improper argument was exacerbated by the prosecutor's previous mischaracterization of Rich's testimony and incorrect assertion that Rich herself testified that the other witnesses lied and that only she was telling the truth." Rich, slip. op. at 17.

While recognizing this flagrant prosecutorial misconduct, the Court reasoned that the prejudicial effect of the comments could have been neutralized by an objection and curative instruction. Rich, slip. op. at 17. In so holding, the Court of Appeals' decision conflicts with other decisions reversing despite a lack of an objection. Fleming, 83 Wn. App. at 213-16; State v. Miles, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007) (prosecutor's argument that jury had to believe the defendant's evidence in order to find him not guilty was flagrant misconduct justifying reversal). If this Court grants review on the sufficiency of the evidence issue, the Court should also grant review on this issue of prosecutorial misconduct because of the conflict in the caselaw.[3] RAP 13.4(b)(2).

[3] This Court is currently reviewing another case of prosecutorial misconduct where the prosecutor made a similar improper "liar" argument during closing. State v. Mickelson, No. 89920-7 (oral argument heard on September 11, 2014).

E. CONCLUSION

The sufficiency of the evidence issue presented by the State does not involve an issue of substantial public concern. Thus, this Court should deny the State's petition for review. If review is granted, the Court should also review the issue concerning prosecutorial misconduct because of the conflict in the precedent on that issue.

DATED this 21st day of May, 2015.

Respectfully submitted,

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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:

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Answer to State's Petition for Review

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