

FILED  
February 18, 2016  
Court of Appeals  
Division I  
State of Washington  
No. 74041-5-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MIKALA McCULLEY,

Appellant.

---

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in providing Instruction 8 to the jury.

2. Instruction 8 violated Article IV, section 16 of the

Washington Constitution.

3. Instruction 8 violated Ms. McCulley's right to a jury trial in under the Sixth Amendment and Article I, section 21.

4. In the absence of sufficient evidence Ms. McCulley's two convictions for reckless endangerment violate the Due Process Clause of the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article IV, section 16 prohibits a trial court from commenting on the evidence and any improper comment is presumed prejudicial. The measure of damages is a factual issue reserved for the jury. Instruction 8 told the jury it must include the cost of repair and sales tax in the measure of damages. Did Instruction 8 impermissibly comment on the evidence?

2. The Sixth Amendment and Article I, section 21 guarantee a jury determination of each element of the crime. The measure of damages is a factual issue reserved for the jury. Where it required the

jury to include the cost of repair and sales tax in its determination of damages, did Instruction 8 violate Ms. McCulley's right to a jury trial?

3. Due process requires the State prove each element of an offense beyond a reasonable doubt. A conviction of reckless endangerment requires the State prove beyond a reasonable doubt the person knew of and disregarded a substantial risk of death or serious injury would result from their act. Where the State only proved the possibility of harm, and did not prove that possible harm rose to the level of death or serious injury, did the State prove each element of the offense beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Jacklyn Clay testified she drove her boyfriend Emerson Miller to visit his daughter at the home of Ms. McCulley's mother. 7/20/15 RP 63. This arrangement existed as a no-contact order prevented Mr. Miller from contacting Ms. McCulley, his daughter's mother.

Ms. Clay claimed that while she waited in the parking lot smoking a cigarette, Ms. McCulley angrily approached her. 7/20/15 RP 63-64. Ms. Clay testified she told Ms. McCulley she did not wish to argue because her children were in the car. According to Ms. Clay, Mr. Miller restrained Ms. McCulley as Ms. Clay got into the car and began

driving away. *Id.* at 65. By Ms. Clay's account Ms. McCulley threw a rock or piece of concrete at the car's rear window causing the rear window to completely shatter inwards, although the rock itself bounced off the window and rolled off the car. *Id.* 65, 85 Ms. Clay immediately called 911. *Id.*

Mr. Miller was not present when police arrived. 7/20/15 RP 132. Moreover, the officer did not note the presence of the two infants either in the car or with Ms. Clay. 7/20/15 RP 132. Ms. Clay explained her children's absence insisting her sister had responded to her call for help, arrived and departed to take the children home in the time between the 911 call and the officer's arrival. 7/20/15 RP 66. When the officer spoke with Ms. McCulley's mother, she told the officer Ms. McCulley was not there. *Id.* at 127

Further, the rock or whatever item Ms. Clay contended had shattered her window was never identified, much less recovered.

Both Ms. McCulley and her mother testified Ms. McCulley was not present during the incident consistent with the arrangement for the two using a third-party to facilitate Mr. Miller's ability to visit his daughter in light of the no-contact order. 7/20/15 RP 143; 7/21/15 RP 168.

The State charged Ms. McCulley with one count of first degree malicious mischief and two counts of reckless endangerment. CP 73.

A jury convicted Ms. McCulley as a charged. CP 52-54.

D. ARGUMENT

**1. Instruction 8 constituted an impermissible judicial comment on the evidence and deprived Ms. McCulley of her right to a jury trial.**

*a. A court's instructions to the jury may not comment on the evidence nor remove factual determinations from the jury's consideration.*

Article IV, section 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A comment on the evidence “invades a fundamental right” and may be challenged for the first time on appeal. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Beyond the prohibition of judicial comments, “[t]he Sixth Amendment provides that those ‘accused’ of a ‘crime’ have the right to a trial ‘by an impartial jury.’” *Alleyne v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013). This right, together with the Fourteenth Amendment Due Process Clause, requires the State prove each element to a jury beyond a reasonable doubt. *United States*

*v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A similar requirement flows from the jury-trial guarantee of Article I, section 22 and the due process provisions of Article I, section 3 of the Washington Constitution. *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

*b. Instruction 8 commented on the evidence and removed the question of damages from the jury's consideration.*

Pursuant to RCW 9A.48.080 a person is guilty of first degree malicious mischief if they cause “physical damage to the property of another in an amount exceeding seven hundred fifty dollars.”

The question of damages is reserved for the jury by Article I, section 21. The Supreme Court has held the assurance that the right “shall remain inviolate” requires a jury determination of damages.

Washington has consistently looked to the jury to determine damages as a factual issue . . . . This jury function receives constitutional protection from article 1, section 21.

*Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711, amended, 780 P.2d 260 (1989).

RCW 9A.48.010(1)(b) provides:

“Damages”, in addition to its ordinary meaning, includes any charring, scorching, burning, or breaking, or agricultural or industrial sabotage, and shall include any diminution in the value of any property as a consequence of an act . . . .

Over defense objection, the court instructed the jury:

“Physical damage” in addition to its ordinary meaning, includes any diminution in the value of any property as a consequence of any act.

“Damages” include the reasonable cost of repairs to a damaged automobile to restore it to its former condition, including any sales tax imposed.

CP 66. The pattern instruction includes only the first paragraph. 11A

Wash. Prac., *Pattern Jury Instr. Crim.* WPIC 88.03.

The additional language in Instruction 8 tells the jury it **must** rather than may include both the cost of repair and sales tax in determining the amount of damages proved by the State. That removes a factual question from the jury’s consideration.

The State contended its alteration of the standard instruction was based upon *State v. Ratliff*, 46 Wn. App. 325, 329, 730 P.2d 716 (1986) and *State v. Gilbert*, 79 Wn. App. 383, 385, 902 P.2d 182 (1995).

*Ratliff* concluded that because the “ordinary meaning” of damages includes the reasonable cost of repair the trial court could instruct the jury to that effect. 46 Wn. App. at 328-29. First, if it is within the ordinary meaning of the word, there is no reason to separately instruct on that point. *State v. Guloy*, 104 Wash. 2d 412, 417, 705 P.2d 1182, 1187 (1985) (“commonly understood words require no definition”). Rather, by highlighting one aspect of the “ordinary meaning” of damages, the instruction removes a factual question from the jury. The instruction does not say “‘damages’ may include” but instead says the term “‘damages’ does include” removing any discretion from the jury to conclude otherwise. So too, the instruction requires the jury to include sales tax in the measure of damages.

The authorities *Ratliff* relied upon did not require the jury to find the cost of repair was a part of “damages.” Those authorities did not even require a trial court to provide such an instruction. Instead, those authorities only recognized such evidence could be submitted to the jury. *See McCurdy v. Union Pacific Railroad Co.*, 68 Wn.2d 457, 469, 413 P.2d 617 (1966). *McCurdy* held that a trial court must allow evidence of the cost of repair to be presented to the jury to permit the jury to determine whether those costs should factor into its measure of

damages and to what degree. *Id.* The Court found that by failing to do so the trial court “usurp[ed] the province of the jury.” *Id.* The same sort of usurpation occurs, however, where the trial court tells a jury they must include the cost of the repair in their determination of damages. If it is a factual matter for the jury to resolve, telling the jury it must reach a certain factual conclusion is no less a constitutional violation than preventing the jury from reaching that same conclusion.

*Gilbert* says nothing more, concluding the trier of fact, in that case a judge in a bench trial, did not err in including the cost of repair in its measure of damages. 79 Wn. App. at 385. Again, the Court did not require the factfinder to do so. Instead, as in *McCurdy*, the Court merely recognized the appropriateness of doing so. *Id.*

Instruction 8 is not a correct statement of the law as it requires the jury reach a specific factual conclusion where the law expressly recognizes a jury’s discretion to reach or reject that factual conclusion. Not only is it contrary to the law on that point, by usurping the jury’s province on the factual determination of damages, Instruction 8 violates Article I, section 21. “Because the jury’s province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance.” *Sofie*, 112

Wn.2d at 661. Further, by directing the jury to include the cost of repair and sales tax in its factual determination, Instruction 8 violated Article IV, section 16.

*c. This Court should reverse Ms. McCulley's conviction of malicious mischief.*

[A] judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.

*State v. Levy*, 156 Wn. 2d 709, 725, 132 P.3d 1076 (2006). The State cannot meet that burden here.

The State's proof of damages consisted of an estimate obtained by the vehicle's owner EAN Holdings. Ex 1. The itemized estimate provided for \$290.72 for parts less a discount of \$2.36; paint supplies of \$92.40; "body labor" of \$387.60; "paint labor" of \$142.80; and "miscellaneous" of \$20. Had the jury elected not to include the cost of repair in its measure of damages, as *McCurdy* would permit the jury to do, the damages would not exceed the \$750 threshold of the crime. Thus the State cannot demonstrate no possibility of prejudice resulted from the judicial comment. The presumption of prejudice requires a new trial. *Levy*, 156 Wn. 2d at 725

The violation of Ms. McCulley's right to a jury determination similarly requires reversal.

An instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet that burden in this case.

Again, whether the jury included the cost of repair in its measure of damages is determinative of the sufficiency of the State's proof. *McCurdy* and *Sofie* make clear that determination is for the jury alone, and necessarily recognize it could have properly excluded that amount. The State cannot prove beyond a reasonable doubt that the jury would have included that amount had it not been directed to.

Ms. McCulley is entitled to new trial.

**2. The State did not prove each element of reckless endangerment beyond a reasonable doubt.**

*a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt.*

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Winship*, 397

U.S. at 364(1970). Evidence is sufficient to support a conviction only if, “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.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

*b. The State did not prove Ms. McCulley created a substantial risk of death or serious physical injury.*

A person commits reckless endangerment if her conduct “creates a substantial risk of death or serious physical injury to another person.” RCW 9A.36.050. A “substantial risk” is more than a possibility but rather is considerable. *State v. Rich*, \_\_ Wn.2d \_\_, (91623-3, p4, January. 7, 2016). Thus, the person must know of and disregard such a substantial risk. *Id.* The State did not meet that burden here.

According to the evidence, whatever broke the window was thrown as the vehicle drove away in the opposite direction, and while it broke the window was of insufficient mass to actually go through window. At most it created a possibility of some harm. It was not enough for the State to simply prove the acts created a risk of harm, but rather the State must prove the acts created a considerable risk

death or serious bodily injury. Perhaps, the State's evidence establishes that a risk of harm existed. But nothing more than that. The State did not prove the likelihood of harm was considerable or anything more than merely possible. Further, even if the State's evidence established a considerable risk of harm, it did not establish the potential harm rose to the level of "death or serious physical injury."

*c. The Court should reverse the convictions.*

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Ms. McCulley committed reckless endangerment, the judgment may not stand. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969)). The Court should reverse and dismiss the two convictions.

E. CONCLUSION

For the reasons above, this Court should reverse Ms. McCulley's convictions. If the court disagrees and affirms the convictions, the Court should exercise its discretion and deny any claim for costs. *State v. Sinclair*, \_\_ Wn. App. \_\_ (72102-0-I, January 27, 2016).

Respectfully submitted this 18<sup>th</sup> day of February, 2016.

s/ Gregory C. Link  
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Attorney for Appellant

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

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|                             |   |               |
|-----------------------------|---|---------------|
| STATE OF WASHINGTON,        | ) |               |
|                             | ) |               |
| Respondent/Cross-appellant, | ) |               |
|                             | ) | NO. 74041-5-I |
|                             | ) |               |
| MIKALA MCCULLEY,            | ) |               |
|                             | ) |               |
| Appellant-Cross-respondent. | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING 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:

|  |                   |  |
|--|-------------------|--|
| [X] SETH FINE, DPA<br>[sfine@snoco.org]<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE<br>VIA COA PORTAL |
| [X] MIKALA MCCULLEY<br>1316 100 <sup>TH</sup> PL SE<br>EVERETT, WA 98208   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2016.

X \_\_\_\_\_ 

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