70711-6

70711-6

No. 91623-3

No. 70711-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Andrea Rich,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 14 PM 2:36

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

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

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

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

1. In violation of the defendant's right to a fair trial, the prosecutor committed flagrant and ill-intentioned misconduct. 6

   a. The prosecutor improperly argued that in order to acquit, the jury had to believe that all the witnesses called by the State lied. 7

   b. There is a substantial chance that the misconduct affected the jury's verdict and that no curative instruction could have cured the prejudice resulting from the misconduct. 10

2. Seizing on the court's erroneous ruling, the prosecutor improperly argued that the defendant was not credible because she had not called any witnesses in her defense. 11

3. Because the evidence did not show that the defendant drove in an erratic or dangerous manner, insufficient evidence supports the conviction for reckless endangerment. 15

F. CONCLUSION 20

TABLE OF AUTHORITIES

United States Supreme Court Cases

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) 21

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 17

Washington Supreme Court Cases

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 6, 10

State v. Belgarde, 110 Wn2d 504, 755 P.2d 174 (1998) 7

State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991) 12, 14

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009) 15

State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005) 18, 21

State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) 15

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) 12, 14, 16

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997) 20

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 17

Washington Court of Appeals Cases

City of Bellevue v. Redlack, 40 Wn. App. 689, 700 P.2d 363 (1985) 18

State v. Amurri, 51 Wn. App. 262, 753 P.2d 540 (1988) 18

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) 10

State v. Barrow, 60 Wn. App. 869, 809 P.2d 209 (1991) 9

State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74 (1991) 9, 10

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996)..... 7, 9, 11

State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982) 19

State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995)..... 9

Constitutional Provisions

Const. art. 1, § 3 ..... 7, 17

U.S. Const. amend. 14 ..... 7, 17

Statutes

RCW 46.61.502 3

RCW 9A.08.010(1)(c) 18

RCW 9A.36.050..... 3

RCW 9A.36.050(1)..... 17

RCW 9A.56.068..... 3

A. INTRODUCTION

Argument by a prosecutor that the jury must find that the State's witnesses lied in order to acquit is flagrant and ill-intentioned misconduct. During closing argument, the prosecutor argued that in order to acquit the defendant, the jury had to find that all the witnesses besides the defendant lied. Seizing on an erroneous ruling by the court, the prosecutor further argued that because the defendant had not called any witnesses, the jury should not believe her testimony. Because these improper arguments deprived the defendant of a fair trial, this Court should reverse the defendant's convictions for driving under the influence and reckless endangerment. Additionally, because there was insufficient evidence, the reckless endangerment conviction should be dismissed with prejudice.

B. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived the defendant of a fair trial.

2. The court erred in ruling that the prosecutor would be allowed to make a "missing witness" argument during closing.

3. Insufficient evidence supports the conviction for reckless endangerment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is flagrant and ill-intentioned misconduct for a prosecutor to argue that in order to acquit, the jury must find that the State's witnesses

are lying. In contrast to testimony from a police officer, the defendant testified that she had not driven a vehicle before being arrested. In closing argument, the prosecutor argued, "You heard the defendant. You have to believe that all the other witnesses came in here and lied." The prosecutor made other similar arguments. Did this flagrant and ill-intentioned misconduct deprive the defendant of a fair trial?

2. The State sought a "missing witness" instruction. The court denied the request, finding that the requirement that the witness be particularly available to the defendant was not met. Despite finding that the missing witness doctrine was inapplicable, the court ruled the State could make a missing witness argument during closing. During closing argument, the prosecutor argued that the jury should not believe the defendant because she did not call any witnesses in her defense. Did the court err by allowing the prosecutor to make this argument when it had earlier found that the missing witness doctrine was inapplicable?

3. Suspecting that a vehicle on the road was stolen, a police officer testified that he followed a car about four blocks before it was parked at an apartment complex. While noting that the car was speeding, he did not testify that the car was being driven erratically. The defendant, intoxicated, was found in the driver's seat of the parked car with a passenger. Was this evidence sufficient to find that the defendant

recklessly engaged in conduct that created a substantial risk of death or serious physical injury to another person, i.e., reckless endangerment?

D. STATEMENT OF THE CASE

The State charged Andrea Rich with driving under the influence,[1] possession of a stolen vehicle,[2] and reckless endangerment.[3] CP 6-7.

At trial, King County Sheriff's Deputy Paul Mulligan testified he was on afternoon patrol shift on May 27, 2012. RP 72-74. Around 8 p.m. while it was still light outside, Mulligan heard on his radio that Seattle police had located a stolen vehicle, but lost it. RP 74, 84, 89. As 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. Mulligan identified the car as the reported stolen vehicle. RP 75. Mulligan pulled behind the car and followed. RP 78. After traveling about four blocks, the car pulled into an apartment complex and parked. RP 78. 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. The officers

---

[1] RCW 46.61.502.

[2] RCW 9A.56.068.

[3] RCW 9A.36.050.

suspected that Rich was intoxicated. RP 80, 146. Before arresting her, the police claimed to have overheard Rich telling the passenger in the car, a boy appearing to be about 8 or 9 years old, that they found the keys and that they had just got in the car. RP 79, 144-45.

Officer Samuel Copeland, one of the backup officers, testified that Rich told him that her boyfriend, Mohamed, had given her the keys to the car about a week ago. RP 147. Rich, who had a cast on her leg, did not undergo a field sobriety test. RP 80, 119. Two breath test samples, taken after Rich was taken into custody, stated that Rich had a blood alcohol level of .183 and .188. RP 177.

The owner of the car, Yared Metafaria, testified that his car had been missing for about one week. RP 94. One evening, Metafaria went to the laundromat. RP 91. Before leaving home, Metafaria's wife gave him her set of car keys. RP 93. While Metafaria had his own set of keys, he still took his wife's keys. RP 93. Before coming home from the laundromat, Metafaria stopped at a bar to play pool around 8 or 9 p.m. RP 92. He left his wife's set of keys in the car. RP 92, 96. He claimed to have locked the door. RP 93. After leaving the bar around 11 p.m., he noticed his car was missing. RP 92-94. After talking to a friend and his wife, he called the police. RP 94. Metafaria, who works as a Seattle Metro bus driver, claimed to not know Rich. RP 90, 95.

Rich testified that she knew Metafaria, though by the name Mohamed. RP 185-86. She testified that she met Metafaria on the number 120 bus that he drove. RP 185-86. About two weeks before May 27, 2012, they exchanged phone numbers. RP 185, 207-08. He called her. RP 185. Rich did not know he was married. RP 186. Rich and Metafaria went out together and he brought her gifts. RP 186-87, 207. After one night out where they drank together, Metafaria left his car on Delridge Street, close to where one of Rich's sisters lives. RP 187. Metafaria gave Rich the keys to the car and she later drove the car to her other sister's apartment on Ambaum Boulevard near 126th Street. RP 187, 189. Metafaria, who was supposed to pick up his car, did not pick it up. RP 187, 189.

Rich also recounted the events of May 27, 2012 differently than the State's witnesses. Rich testified that she stayed the night at her sister's apartment on Ambaum Boulevard on May 26. RP 185. She texted Metafaria to pick up his car. RP 189. As she was going to the car, she saw a police car drive by and turn around. RP 190. Before the police arrived, Rich had gotten in the car. RP 199. Rich's nephew came out with the keys to the car and got inside the car as the police were arriving. RP 191, 200-01. Rich admitted to drinking alcohol earlier that day. RP 205-

06. She told police that Mohamed (Metafaria) was coming to meet her. RP 198. She denied that she drove that night. RP 190.

The State did not call any rebuttal witnesses. RP 210. The State requested a missing witness instruction. RP 210-11. The trial court denied the request. RP 211-12. The court, however, ruled the State could still make a missing witness argument. RP 212. During closing, the prosecutor[4] argued that the reason Rich's brothers and sisters had not testified was because the events did not happen as Rich testified. RP 226. The prosecutor further contended that to accept Rich's testimony, the jury had to believe that all the State's witnesses "came in here and lied." RP 227. The jury found Rich guilty of driving under the influence and of reckless endangerment, but acquitted her of possession of a stolen vehicle. CP 47-49.

E. ARGUMENT

1. In violation of the defendant's right to a fair trial, the prosecutor committed flagrant and ill-intentioned misconduct.

The right to a fair trial is a fundamental liberty secured by the United States Constitution and the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amend. 14; Const. art. 1, § 3. Prosecutorial misconduct may

[4] There were two prosecutors in the case. RP 5.

deprive defendants of their constitutional right to a fair trial. Glasmann, 175 Wn.2d at 703-04. When a defendant shows that the prosecutor's conduct was improper and prejudicial, the appellate court should reverse. See id. at 704. Prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. Id. Flagrant and ill-intentioned misconduct excuses the lack of an objection by the defendant when an instruction would not have cured the prejudice. Id.

a. The prosecutor improperly argued that in order to acquit, the jury had to believe that all the witnesses called by the State lied.

"[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Misconduct also includes making arguments that are unsupported by the admitted evidence. State v. Belgarde, 110 Wn2d 504, 505, 508-09, 755 P.2d 174 (1998).

Rich and Deputy Mulligan gave conflicting testimony. Mulligan testified that he saw Rich driving and that he followed her until she parked at an apartment complex. RP 75, 78. 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. Rich did not testify that other witnesses were fabricating events. RP 184-208.

Rather than call any rebuttal witnesses, the prosecution decided to challenge Rich's account during closing argument. RP 210. The prosecutor began by misrepresenting Rich's testimony, arguing 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 acquit, the jury had to accept 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.

This argument was plainly misconduct under State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). This type of "liar" argument was improper because it wrongfully implied that in order to find Rich not guilty, the jury had to find that the police officers were lying. Fleming, 83 Wn. App. at 213; State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995) ("It is misconduct, however, for a prosecutor to argue that, in order to *believe* a defendant, a jury must find that the State's witnesses are *lying*."); State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209 (1991);

State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying."). This form of argument misstates the law, misrepresents the role of the jury, and turns the State's burden of proof on its head. See Fleming, 83 Wn. App. at 213. As the court in Casteneda-Perez explained, the prosecutor's apparent tactic is to present the jury with a false choice between finding the defendant guilty or finding the witnesses (often times police officers) liars:

> The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police testimony, they would be inclined to find the defendant guilty.

Casteneda-Perez, 61 Wn. App. at 360. Over twenty years later, despite repeated appellate opinions holding that this is misconduct, prosecutors still resort to the same tactic. See State v. Anderson, 153 Wn. App. 417, 434, 220 P.3d 1273 (2009) (Quinn-Brintnall, J. concurring) ("Nearly two decades have passed since Casteneda–Perez and a dozen years since Fleming. It is disheartening that this improper argument form has cropped up again.").

b. There is a substantial chance that the misconduct affected the jury's verdict and that no curative instruction could have cured the prejudice resulting from the misconduct.

In analyzing whether there is a substantial chance that the misconduct affected the jury's verdict, the focus is on the misconduct and its impact, not on the evidence that was properly admitted. Glasmann, 175 Wn.2d at 711. Here, the misconduct was aimed at Rich's central defense– that she had not been driving. If she had not been driving, then she was not guilty of driving under the influence or reckless endangerment. The jury found reasonable doubt on the possession of a stolen vehicle charge. CP 47. Absent the impact from the prosecutor's flagrant misconduct, this Court cannot be confident the jury would not have also found reasonable doubt on the other two charges.

Although Rich did not object to the prosecutor's improper arguments, this Court in Fleming held this form of argument was so flagrant that the lack of a contemporaneous objection did not preclude reversal. Fleming, 83 Wn. App. at 213-16. There the prosecutor also argued that the jury had to find a State witness had lied in order to acquit:

> Ladies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that

> [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.

Id. at 213 (emphasis omitted). The prosecutor's argument in this case was just as flagrant and ill-intentioned. Following Fleming, this Court should hold the lack of an objection does not preclude review and reverse. Id. at 216.

2. Seizing on the court's erroneous ruling, the prosecutor improperly argued that the defendant was not credible because she had not called any witnesses in her defense.

The court erroneously ruled that the State could make a "missing witness" argument during closing argument. Capitalizing on this ruling, the prosecutor improperly argued that the jury should find Rich guilty because she had not called any witnesses in her defense.

"A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). However, under the "missing witness" doctrine, the State is allowed to "point out the absence of a 'natural witness' when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable." Id. at 598 (citing State v. Blair, 117 Wn.2d 479, 485–86, 816 P.2d 718 (1991)). The hope is that the jury will infer

"that the absent witness's testimony would have been unfavorable to the defendant." Id.

Rich testified that before entering the parked car, she had just come out of her sister's apartment, where she had spent the night. RP 184. Rich stated that her brothers were nearby when the police arrived and that they had a video camera. RP 191. The State requested a missing witness instruction. RP 210-11. Rich opposed the instruction. RP 211. The court denied the instruction, reasoning that the witnesses were not under the control of or particularly available to Rich:

> So, the State is requesting the Jury Instruction, WPIC 5.20, which would allow the jury to infer that since certain witnesses are not called by the defense, the jury can infer that the witnesses would testify adversely to the defense interests.
>
> One of the requirements is that the witness must be in the control of or peculiarly available to the defense. I don't think the State has met that requirement.

RP 211-12. Nevertheless, the court ruled that the State could make a missing witness argument during closing:

> Secondly, however, not giving the instruction does not prevent the State from arguing in closing that if the sister or brother was there, how come they are not here. You can still make that argument.

RP 212. The court did not provide an explanation for this ruling.

During closing argument, the prosecutor contended that the jury should not believe Rich because her relatives had not testified and the defense had not produced a video that Rich's brother might have taken:

> And, then, she told you a few minutes ago that all her brothers and sisters knew about it on May 27th. She said her brother took a video of the whole thing, coming with lights and sirens blazing for no reason. But, they didn't come in and tell you about that. Why not? Why aren't they here? Why aren't they testifying about the 1.88? It's not the way it happened.

RP 226.[5] Shortly thereafter, the prosecutor asked, "Where is that video?" RP 226.

The missing witness "doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties." Montgomery, 163 Wn.2d at 598-99 (citing Blair, 117 Wn.2d at 488, 490). The trial court's ruling that a missing witness instruction was improper but that a missing witness argument was proper is contradictory and erroneous.

Case law establishes that the "particularly available" (also referred to as "peculiarly" available) requirement must be met before the missing witness doctrine can be invoked during closing argument. Blair, the foundational case approving of the State's use of the missing witness doctrine and cited by other cases for the particularly available

[5] The referral to "1.88" is apparently to the breath test results.

requirement, did not involve a jury instruction. Blair, 117 Wn.2d at 484. There, the State made a missing witness argument, which the defendant contended was prosecutorial misconduct. Id. Our Supreme Court rejected the defendant's argument. Id. at 488. The Court determined that "the prosecutor showed the peculiar availability of the witnesses to the defense within the context of the missing witness doctrine." Id. at 491. Thus, the particularly available requirement must be met before making a missing witness argument.

Although Rich did not object to the prosecutor's argument, in light of the court's earlier ruling, an objection was not necessary. "The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Rich had already contested the prosecutor's request for a missing witness instruction. RP 211. The court was aware that Rich opposed the use of the missing witness doctrine. Objection to the State's missing witness argument during closing would have been futile because the court had already ruled that a missing witness argument would be allowed. RP 212. No curative instruction would have been provided. Under these circumstances, the lack of an objection should not preclude review. See State v. Fisher, 165 Wn.2d 727, 746-48, 202 P.3d 937 (2009) (earlier

challenge to ER 404(b) evidence sufficient to preserve issue on whether State committed misconduct by making closing argument based on ER 404(b) evidence).

There is a substantial likelihood that the error was prejudicial. As recounted before, the jury heard two different versions of events. Rich testified she had not been driving the car while Deputy Mulligan testified that Rich had been. The jury found reasonable doubt as to the possession of stolen vehicle charge. Thus the jury likely found part of Rich's account credible. Absent the improper missing witness (and missing evidence) argument, this Court cannot be confident that the jury would not have also found reasonable doubt on the charges of driving under the influence and reckless endangerment. See Montgomery, 163 Wn.2d at 600 (given the competing narratives, improper use of the missing witness doctrine was prejudicial). This Court should reverse.

3. Because the evidence did not show that the defendant drove in an erratic or dangerous manner, insufficient evidence supports the conviction for reckless endangerment.

While it was light outside, Deputy Paul Mulligan testified he saw Rich drive four blocks and park at an apartment complex without incident. She was not reported to have swerved. After Rich parked, Mulligan activated his emergency lights because the car was reported stolen. Because the evidence was insufficient to prove that Rich's driving created

a substantial risk of death or serious physical injury to another person, this Court should reverse the conviction for reckless endangerment.

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. 14; Const. art. 1, § 3. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State. Id.

"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). "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). This definition has subjective and objective components because it involves what the defendant knew and how a reasonable person

would have acted knowing what the defendant knew. State v. Graham, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005).

There was evidence showing that Rich drove the car while under the influence of alcohol. However, this fact alone does not satisfy the State's burden of proving beyond a reasonable doubt that Rich's driving created a substantial risk of death or serious physical injury to another person. 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.")[6]; City of Bellevue v. Redlack, 40 Wn. App. 689, 697, 700 P.2d 363 (1985) ("we cannot say that every driver convicted of DWI will automatically be guilty of negligent driving."). If driving while under the influence of alcohol, by itself, was sufficient, then Rich's convictions for driving under the influence and reckless endangerment would violate the prohibition against double jeopardy. See State v. Potter, 31 Wn. App. 883, 888, 645 P.2d 60 (1982) (holding that the prohibition against double jeopardy forbids convictions for both reckless endangerment and reckless driving because "proof of reckless endangerment through use of an automobile will always establish reckless driving."). Thus, evidence besides driving under the influence in

[6] "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.

the presence of another person (e.g., a passenger, pedestrian, or driver of another vehicle) is required to prove reckless endangerment.

Here, Deputy Mulligan, the only witness who testified about Rich's driving, did not testify that Rich's driving was erratic or indicative of a dangerous driver. RP 72-89. He only testified that Rich passed him in the right lane while he was "doing the flow of traffic, about 35" miles per hour and that he had to accelerate to about 50 miles per hour to catch up with her. RP 75. After he followed her for about four blocks, she safely parked at an apartment complex. RP 78. Only after Rich parked, did the officer activate his emergency lights. RP 78. State Patrol Officer Jon Liefson, who conducted the breath test of Rich, testified he was not told that Rich had been weaving. RP 121.

Mulligan's testimony is evidence that Rich was speeding somewhere between 36 miles per hour and 50 miles per hour.[7] Speeding is prima facie evidence of reckless driving. RCW 46.61.465. Of course, speeding is not necessarily reckless. See State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (driver's speed of 10 to 20 miles per hour over posted speed limit of 50 miles per hour was not "so excessive that one can infer solely from that fact that the driver was driving in a rash or

[7] Mulligan testified that he had to speed up to about 50 miles per hour to catch up to Rich. Thus, she must have been traveling at less than 50 miles per hour.

heedless manner, indifferent to the consequences."). Because speeding is not necessarily reckless, an instruction telling the jury that it may infer reckless driving based on driving in excess of the maximum lawful speed may be erroneous. Id. at 75-78. Rarely will speed alone justify such a permissive inference instruction. Id. at 78. Here, Rich's mere speeding of less than 15 miles above the posted limit of 35 miles per hour was not excessive enough to constitute recklessness.

State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005) illustrates what kind of driving is sufficient to recklessly endanger another person. There, an inexperienced 16-year-old girl drove at double the posted speed limit of 40 miles per hour, purposefully rocked the steering wheel back and forth to make the car swerve, and tried to adjust the car stereo, culminating in an accident that killed one of the passengers and injured three others. Graham, 153 Wn.2d at 403. The Supreme Court held the evidence was sufficient to find the defendant guilty for three counts of reckless endangerment. Id. at 402.

Rich, although intoxicated, was not observed driving erratically or dangerously. Deputy Mulligan only testified that he saw Rich speeding somewhere between 35 and 50 miles per hour for about four blocks. Before Deputy Mulligan activated his emergency lights, Rich had already slowed down and was safely parked at an apartment complex. She was

not reported to have been swerving or weaving. This Court should conclude that the evidence was insufficient to find that Rich's driving created a substantial risk of death or serious physical injury to another person. Accordingly, the reckless endangerment conviction should be reversed and dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

F. CONCLUSION

Insufficient evidence supports the reckless endangerment conviction. It should be dismissed with prejudice. This Court should also reverse the driving under the influence conviction and remand for a new trial because the State's flagrant prosecutorial misconduct and the court's erroneous missing witness ruling deprived Rich of a fair trial.

DATED this 13th day of March, 2014.

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,	)	
	)	NO. 70711-6-I
v.	)	
	)	
ANDREA RICH,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MARCH, 2014, 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] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ANDREA RICH 8424 DELRIDGE WAY SW SEATTLE, WA 98106	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF MARCH, 2014.

X_____

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