70711-6

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No. 91623-3

NO. 70711-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREA RICH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 3

1. PROCEDURAL FACTS 3

2. SUBSTANTIVE FACTS 3

C. ARGUMENT 11

1. RICH FAILS TO MEET HER BURDEN THAT THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT 11

2. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO MAKE A MISSING WITNESS ARGUMENT 22

a. Rich Failed To Preserve Any Error Because She Did Not Object To The Ruling Or To The State's Argument 23

b. The Trial Court's Decision Not To Give A Missing Witness Jury Instruction Did Not Preclude The Court From Allowing The State To Argue The Doctrine At Closing 25

c. The Missing Witness Doctrine Applied 28

d. Rich Cannot Show Prejudice From Any Error Allowing The State To Make A Missing Witness Argument 31

3. THE EVIDENCE WAS SUFFICIENT TO FIND THAT RICH COMMITTED RECKLESS ENDANGERMENT 33

D. CONCLUSION 40

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

In re Winship, 397 U.S. 358,
90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 34

Washington State:

City of Bellevue v. Redlack, 40 Wn. App. 689,
700 P.2d 363 (1985) 38

Ertman v. City of Olympia, 95 Wn.2d 105,
621 P.2d 724 (1980) 30

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995) 34

State v. Amurri, 51 Wn. App. 262,
753 P.2d 540 (1988) 38, 39

State v. Anderson, 153 Wn. App. 417,
220 P.3d 1273 (2009) 19

State v. Barrow, 60 Wn. App. 869,
809 P.2d 209 (1991) 13, 14, 20

State v. Blair, 117 Wn.2d 479,
816 P.2d 718 (1991) 26, 27, 28, 29

State v. Castaneda-Perez, 61 Wn. App. 354,
810 P.2d 74 (1991) 15, 16, 20, 21

State v. Cheatam, 150 Wn.2d 626,
81 P.3d 830 (2003) 26, 27, 28, 29

State v. Contreras, 57 Wn. App. 471,
788 P.2d 1114 (1990) 31

State v. Day, 51 Wn. App. 544,
754 P.2d 1021 (1988) 15

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012) 14

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107, review denied,
141 Wn.2d 1023 (2000) 34

State v. Fisher, 165 Wn.2d 727,
202 P.2d 937 (2009) 25

State v. Fleming, 83 Wn. App. 209,
921 P.2d 1076 (1996) 12, 13, 18, 20

State v. Goodman, 150 Wn.2d 774,
83 P.3d 410 (2004) 34

State v. Graham, 153 Wn.2d 400,
103 P.3d 1238 (2005) 39

State v. Gregory, 158 Wn.2d 759,
147 P.3d 1201 (2006) 31, 32

State v. Magers, 164 Wn.2d 174,
189 P.3d 126 (2008) 11

State v. Michielli, 132 Wn.2d 229,
937 P.2d 587 (1997) 30

State v. Montgomery, 163 Wn.2d 577,
183 P.3d 267 (2008) 26, 32

State v. Perez, 137 Wn. App. 97,
151 P.3d 249 (2007) 40

State v. Potter, 31 Wn. App. 883,
645 P.2d 60 (1982) 38

State v. Powell, 166 Wn.2d 73,
206 P.3d 321 (2009) 23

State v. Randhawa, 133 Wn.2d 67,
941 P.2d 661 (1997) 38

State v. Russell, 125 Wn.2d 24,
882 P.2d 747 (1994) 12

State v. Stenson, 132 Wn.2d 668,
940 P.2d 1239 (1997) 16

State v. Swan, 114 Wn.2d 613,
790 P.2d 610 (1990) 12

State v. Thorgerson, 172 Wn.2d 438,
258 P.3d 43 (2011) 11, 12, 20

State v. Wheless, 103 Wn. App. 749,
14 P.3d 184 (2000) 19

State v. Wright, 76 Wn. App. 811,
888 P.2d 1213 (1995) 18, 19

Constitutional Provisions

Federal:

U.S. Const. amend. XIV 33

Statutes

Washington State:

RCW 9A.08.010 35

RCW 9A.76.160 34

RCW 46.41.500 38

RCW 46.61.465 39

Rules and Regulations

Washington State:

ER 404 25

RAP 2.5 23

Other Authorities

WPIC 5.20 ..... 9, 23, 24, 27

A. ISSUES PRESENTED

1. The failure to object to a prosecutor's remark waives a claim of error on appeal unless the remark is so flagrant and ill-intentioned that it caused an enduring prejudice that no curative instruction could have neutralized. It is flagrant and ill-intentioned misconduct for a prosecutor to instruct a jury that they must find that the State's witnesses lied *in order to acquit the defendant*. Where defendant Andrea Rich testified to a version of the events that was completely irreconcilable with the statements of three police officers, a toxicologist and the victim of the car theft at issue, the prosecutor argued that to believe the defendant's version, the jury would have to believe that the other witnesses had lied. No objection was made. Has Rich failed to meet her burden of establishing flagrant and ill-intentioned misconduct?

2. It is within a trial court's discretion to allow a missing witness argument if it can be shown as a matter of reasonable probability that a witness was particularly available to a party; the party would not have failed to call the witness unless that person's testimony was damaging; the testimony would not be cumulative or unimportant; the witness's absence cannot be satisfactorily explained; no privilege exists; and the witness's testimony would

not be self-incriminatory. Here, Rich did not object when the trial court allowed the State to make a missing witness argument at closing after it declined to give a jury instruction. Did Rich waive her right to appeal this issue by failing to object? If not, did the trial court properly exercise its discretion in allowing the argument?

3. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To prove the crime of reckless endangerment, the State must prove that a defendant recklessly engaged in conduct that creates a substantial risk of death or serious physical injury to another person. The State presented evidence that Rich was speeding at 50 m.p.h. in a 35 m.p.h. zone with a 7-8 year old child in the front passenger seat while so impaired that she had a BAC of twice the legal limit (.18) one and a half hours later and exhibited signs of impairment such as slurred repetitive speech, bloodshot and watery eyes, poor coordination, and inconsistent statements that were "all over the place." Is this sufficient evidence to demonstrate that Rich recklessly endangered another person?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Andrea Rich was charged by amended information with Possession of a Stolen Vehicle, Driving While Under the Influence, and Reckless Endangerment. CP 6-7. Trial began on May 22, 2013. 1RP 5.[1] A jury convicted Rich of Driving Under The Influence and Reckless Endangerment and acquitted her of Possession of a Stolen Vehicle. CP 47-50. The trial court sentenced Rich to 140 days in custody and 150 days of Electronic Home Detention. CP 53-55.

2. SUBSTANTIVE FACTS

One evening in May 2012, Yared Metafaria took his Acura MDX to the Laundromat to wash some pillowcases. 2RP 91-92. After finishing at around 8:00 or 9:00 p.m., he drove to the Blue Nile restaurant on 12th Ave. and Jefferson St. in Seattle and parked his car on the street. RP 92. He left the back window down a little bit to let the pillowcases dry. 2RP 93. Although he took his car keys before heading inside, he forgot to take the second set of keys

[1] The verbatim report of proceedings consists of five volumes referred to in this brief as follows: 1RP (May 22-23, 2013); 2RP (May 28-29, 2013); 3RP (May 29, 2013); 4RP (May 30, 2013); 5RP (July 26, 2013).

belonging to his wife from the cup holder in the Acura. 2RP 93, 96. When Metafaria came out of the Blue Nile at around midnight, the car was gone. 2RP 94. Upset, he called the police. Id.

On May 27, 2012, at around 8:00 p.m., King County Sheriff's Deputy Paul Mulligan was on patrol when he heard the report of a stolen vehicle sighting from Seattle Police. 2RP 74. Twenty minutes later, he was driving southbound in the outside lane of the 12200 block of Ambaum Boulevard when he saw the stolen vehicle pass him in the inside lane. 2RP 74-75. Although Mulligan had initially been driving at the flow of traffic, about 35 m.p.h., he had to speed up to 50 m.p.h. to catch up to the speeding car. Id. The vehicle was confirmed to be Metafaria's stolen Acura MDX. 2RP 75, 95, 182-84.

Mulligan followed the car for about four blocks before it pulled into the parking lot of an apartment complex. 2RP 78. He did not activate his emergency lights until the car stopped on its own, at which point he pulled in directly behind it, turned on the lights, and waited for backup. Id. He did not use his siren. 2RP 88. The Acura's driver's side door came open. 2RP 78. Mulligan stepped out of his car but did not approach the other vehicle, which was 20 feet away. 2RP 78-79, 85. As he waited for

backup, he could see Rich in the driver's seat. 2RP 79. He heard her speaking loudly to the passenger in the front seat, who turned out to be a young boy approximately 7-8 years old, instructing the child to tell the police that they had just found the keys and gotten into the car. Id.

One minute later, Deputy Samuel Copeland joined Mulligan. 2RP 80, 150. They instructed Rich to get out of the driver's seat and took her into custody. 2RP 80. Mulligan believed Rich was intoxicated; she had glassy and watery eyes, she was staring "like she was just kind of not really with it, not knowing what was going on," and she had been talking to the little boy in the front seat so loudly that Mulligan could hear her 20 feet away in his car, despite the fact that the child was sitting right next to her. 2RP 80-81.

Copeland also believed that Rich was intoxicated. Before he and Mulligan approached the car, he, too, overheard Rich telling the child loudly what to say: that they had just found the keys and were just parking the car, that they had not been in a stolen car, instructing him to hold the keys and to hide them from police. 2RP 145. At that point, Copeland, who was also about 20 feet from Rich's car, yelled at her to stop talking. 2RP 145. Upon contact, Copeland smelled the odor of intoxicants coming from her breath

and person, and personally observed her "erratic behavior." 2RP 146-47. Her voice was "up and down," her speech was slurred, and she gave inconsistent, conflicting statements that were "all over the place." 2RP 146, 148. Rich told Copeland that her boyfriend "Mohamed" had given her the keys and told her not worry about the title when she asked for it. 2RP 146.

Rich was handed over to Washington State Patrol Trooper Jon Leifson at around 8:30 p.m.; because of his agency's expertise in the area, Leifson performed the DUI investigation. 2RP 108-10. Leifson had been trained to determine levels of intoxication based on physical observations, without the use of a Datamaster breath test machine. 2RP 105. He noted Rich's bloodshot and watery eyes, "very strong odor of intoxicants," mood swings, poor coordination, and repetitive slurred speech, "ask[ing] the same questions over and over again." 2RP 110-18. Rich had difficulty just attempting to get pieces of paper for him. 2RP 117. She claimed she had only had one shot at a bar by herself that day. 2RP 122. Leifson believed she was obviously intoxicated. 2RP 118. He took two breath tests from Rich at 9:30 p.m. and 9:32 p.m., which revealed a blood alcohol content (BAC) of .183 and .188. Ex. 5; 2RP 116, 169, 177.

Washington State Patrol Toxicologist Justin Knoy indicated that once an individual reaches a BAC of .08 (the legal limit to drive), she has sufficient alcohol in her system to be unable to operate a car in a safe manner. 2RP 133. Since alcohol acts as a central nervous system depressant, it slows down brain activity and results in difficulty understanding instructions, confusion, repetitive speech, rapid mood changes, coordination problems, and a delay in information-processing such as how to react to a particular stimulus as well as slowing down the actual reaction time itself. 2RP 138. Alcohol burns off at a rate of .015 per hour. 2RP 134.

Rich testified at trial. She claimed that she had never driven the car that night, and was just getting into the Acura from her wheelchair in the parking lot when the police drove up behind her with the sirens on. 2RP 184, 190. She further insisted that right before their arrival, her nephew had come out with the keys and then gotten into the passenger seat. 2RP 191. Rich also denied having any conversation with her nephew that night beyond telling him it would be all right. 2RP 201.

Contrary to what she had told Leifson, Rich asserted on the stand that she had had two shots two hours prior, a "little" Mike's Lemonade earlier that day, and that she never goes to bars.

2RP 201, 203, 205. She first admitted being drunk, then claimed she wasn't affected and that alcohol did not affect one's memory. 2RP 194-95.[2] She also contended that her brothers were present during the incident and one of them had recorded the entire police encounter on videotape.[3] 2RP 191.

Moreover, Rich also insisted that she and Metafaria had a romantic relationship and that he had lent her the car. 2RP 185-88. Despite this, she did not know Metafaria's name (saying she knew him as "Mohamed," last name unknown) and claimed she had lost her phone and thus the text messages that would support their alleged relationship. 2RP 188, 190. Metafaria testified that he had never met Rich, did not recognize her at all, and had never given her or anyone else besides his wife permission to drive the Acura in May. 2RP 95. Nevertheless, Rich asserted that "Mohamed" had picked her up in the car on May 18th and parked on Delridge with

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[2] She eventually stated that "it depends on how much you drink." 2RP 195.

[3] On the first day of trial, Rich's defense attorney had informed the court that Rich had told him for the first time about witnesses she wished to call for trial. 2RP 32. Rich did not know the names or contact information of most of these witnesses, only that of her sister, Kyra Lewis, who "was outside in the parking lot when everything happened," and Kyra's husband Ayeshia (whose phone number Rich did not know). 2RP 33-36. Rich also claimed that a nameless brother had a video of the incident. 2RP 34. The court gave Rich's attorney specific instructions to try to contact Ayeshia Lewis over the next four days to determine if that witness had anything relevant to say. 2RP 36-37. Defense counsel was never able to obtain any relevant testimony from these witnesses, one of whom simply hung up on him. 2RP 209.

the apparent intention of picking it up from her later, and that she had informed him by phone that her sister had moved the car to Ambaum that same day.[4] 2RP 187-88. Rich declared that it had been sitting there from May 18-27, and that despite knowing this, Metafaria had reported it stolen. 2RP 7.

Prior to closing arguments, the court denied the State's motion to give WPIC 5.20, known as the "missing witness" instruction, because it believed the State had not shown the missing witnesses' "peculiar availability" to Rich. 2RP 210-12. However, the court stated that "not giving that instruction does not prevent the State from arguing in closing that if the sister or brother was there, how come they are not here." 2RP 212. Defense counsel did not object to this ruling, neither when it was made outside the presence of the jury nor at any point during closing argument. 2RP 212, 226.

In closing argument, the prosecutor initially went through the elements of the three crimes. 2RP 214-23. She then noted: "Now, the defendant can testify. And she told a totally different story. She said that the car owner -- and all of the officers [who] testified, Deputy Mulligan, Deputy Copeland -- they just made it all up,

[4] It is unclear from Rich's testimony how Metafaria got home if he left the car with Rich.

everything they said was a fabrication, and only she is telling you the truth." 2RP 223-24.

The prosecutor went on to challenge the logic and consistency of Rich's testimony, including the rationale that Metafaria had declared the car stolen to hide an affair even though he knew its location the entire time, and Rich's insistence that her brothers could attest to her version of the events and even had a corroborating video: "But they didn't come in and tell you that. Why not? Why aren't they here?" and "Where is that video?" 2RP 224-26. She then referenced the ways to determine a witness's credibility, including the examination of bias. "We talked about that a little bit during voir dire . . . why would they lie? . . . [Rich] is facing consequences . . . that she wants to avoid." 2RP 226. She concluded this argument with the following statement:

> You get to decide the facts based upon the credible sworn testimony that you heard, the evidence presented at trial, and the instructions that Judge Spearman read to you. I think when you examine the defendant's testimony, you will not find it credible. She gave a preposterous story. You heard the defendant. You have to believe that all the other witnesses came in here and lied.

2RP 226.

Defense counsel did not object at any point during the State's closing. In his own closing, counsel began and ended with an emphasis on the standard of reasonable doubt. 2RP 228, 231. He noted that "it's your decision to tell who you believe and who you don't believe," and went on to pinpoint aspects of the State's case that produced reasonable doubt. 2RP 228-29.

C. ARGUMENT

1. RICH FAILS TO MEET HER BURDEN THAT THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT.

Rich contends that the prosecutor committed reversible misconduct by arguing that in order to acquit, the jury would have to find that all the other witnesses lied. App. Br. 1. Because the State made no such argument, but rather emphasized that the two stories were completely contradictory, her claim fails. Furthermore, because Rich made no objection, any misconduct claim is waived.

To establish prosecutorial misconduct, Rich must show "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Prejudice is established only when "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Id. at 442-43. If a defendant fails to object to an argument at trial, she has waived the claim unless she can show that "the remark was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

> The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial ... in the context of the trial. Moreover, counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal.

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (internal quotations omitted).

Rich contends that the prosecutor's remarks amounted to flagrant and ill-intentioned misconduct and thus the lack of objection should not preclude review. App. Br. 9, 11. She relies primarily on State v. Fleming for this argument. 83 Wn. App. 209, 921 P.2d 1076 (1996). In Fleming, the prosecutor made a series of statements, one of which explicitly instructed the jury that "*[f]or you*

to find the defendants . . . not guilty of the crime of rape in the second degree . . . you would have to find either that [the victim] has lied about what occurred in that bedroom or that she was confused." Id. at 213 (emphasis in original). The court held that such an argument creating such a prerequisite for acquittal had long been declared improper, and "we therefore deem it to be a flagrant and ill-intentioned violation of the rules." Id.

The conduct complained of here is plainly distinguishable from the statements in Fleming, where the prosecutor erroneously stated that the jury could not *acquit* unless they found that the State's witness had lied. Here, the prosecutor told the jury that in order to *believe the defendant's version* in the face of two completely conflicting accounts, it would have to believe that the other witnesses had lied. There is a clear distinction between that particular statement and those comments targeted as flagrant and ill-intentioned by the court in Fleming, which equate *acquittal* with a necessary finding that police officers had committed perjury.

For further support, Rich cites to State v. Barrow, where the court disapproved of comments by the prosecutor that "'*in order for you to find the defendant not guilty on either of these charges,* you have to believe his testimony and you have to completely

disbelieve the officers' testimony. You have to believe that the officers are lying.'" 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991) (emphasis added). However, her reliance is misplaced as these comments again placed an impermissible condition on the actual acquittal of the defendant, an issue not present here.

Moreover, our Supreme Court has said that in analyzing the impropriety and prejudicial impact of a prosecutor's remarks "we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." State v. Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012). Here, the evidence presented to the jury involved two wholly incompatible versions of a single event. Rich claimed she had never driven the car and was simply getting into it from her wheelchair when the police arrived with sirens on, that she had not had any conversation with her nephew in the front seat besides some reassuring words, that she was not affected by alcohol, and that the car was not stolen but in fact given to her by her boyfriend Mohamed. 2RP 184-90, 194, 204-05.

In sharp contrast, the owner of the car (whose name was not Mohamed but Metafaria) testified he had never met Rich before and had no idea who she was; Deputy Mulligan testified that he in fact saw Rich driving the car for four blocks with the young boy in the passenger seat whom she later loudly instructed to lie to the police; and Mulligan and two other law enforcement officers all agreed as to the obvious physical signs of Rich's impairment, confirmed by a BAC of twice the legal limit. 2RP 75-81, 95-96, 110-18, 144-48.

The prosecutor's remarks that Rich's story was "preposterous" in the face of numerous witnesses flatly denying her claims, and that "you have to believe that all the other witnesses came in here and lied" were thus responding to the wholly incongruous evidence at trial.[5] This was not a situation, as in State v. Castaneda-Perez, where the court was concerned about the unfairness of such a remark because "the testimony of two witnesses can be *in some conflict,* even though both are

[5] In State v. Day, the court held that use of the word "preposterous" was a permissible inference from the evidence at trial and thus not misconduct. 51 Wn. App. 544, 552, 754 P.2d 1021 (1988).

endeavoring in good faith to tell the truth." 61 Wn. App. 354, 363, 810 P.2d 74 (1991). The two stories here were in total and irreconcilable conflict. Given a prosecutor's wide latitude in closing argument to draw and express reasonable inferences from the evidence, the argument does not amount to flagrant misconduct. See State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

The context of the argument confirms that the prosecutor's statements were not about the jury's duty to return a verdict of guilt absent a finding of perjury on behalf of the State's witnesses, but rather were part of a larger argument regarding Rich's credibility. Immediately prior to the statement to which Rich objects, the prosecutor discussed Rich's personal bias in the outcome, the incongruity of the evidence with her testimony, and the effects of her intoxication on her memory: "She gave a pretty good reason to hide the fact that she was driving drunk with a little boy. Well, the story doesn't meet up with the evidence. Where is that video? Her memory, she said, wasn't even affected by the .183/.188. Does that sound right to you?" 2RP 226.

This accurately reflects the jury instruction addressing the determination of witness's credibility. See CP 23 (instructing the jury that they may consider, among other things, "the ability of the witness to observe accurately . . . any personal interest that the witness might have in the outcome . . . [and] the reasonableness of the witness's statements in the context of all the other evidence").

The prosecutor then entreats the jury to examine the reasonableness of the evidence when making a credibility determination; it is in this context that she makes the statement that Rich claims as error:

> Use your common sense and every day knowledge, to decide the facts of what happened here . . . You get to decide the facts based upon the credible sworn testimony that you heard, the evidence presented at trial, and the instructions that Judge Spearman read to you. I think when you examine the defendant's testimony, you will not find it credible. She gave a preposterous story. You heard the defendant. You have to believe that all the other witnesses came in here and lied.

2RP 226-27.

The majority of these comments correctly describe the jury's obligation to evaluate the internal and comparative consistency of all witnesses, including Rich. See CP 23-24 (instructing the jury on

its duty to evaluate witness credibility and decide the case based on the evidence admitted and the law provided by the trial court).

Even if this Court finds improper the prosecutor's single remark that a belief in the defendant's story required a belief that the state's witnesses had lied, reversal is still inappropriate. As explained above, the brief reference was not flagrant and ill-intentioned under Fleming, and thus Rich waived any claim of error by failing to object. Although Rich appears to cite to State v. Wright to support her contention that the comment made here, distinct as it is from the one in Fleming, still qualifies as flagrant and ill-intentioned, that court made no such determination. App. Br. 8-10; Wright, 76 Wn. App. 811, 826, 888 P.2d 1213 (1995).

In Wright, the prosecutor argued that in order to believe the defendant's testimony, the jury would have to believe that the officers "got it wrong," a statement that the court ultimately found was proper argument. 76 Wn. App. at 826. Although the court further stated in dicta that it is misconduct to say that one must believe the State's witnesses are lying in order to believe a defendant's contrary story, those particular types of statements

were not before the court at the time nor did the court ever make a finding that such statements were flagrant and ill-intentioned.[6] Id.

In fact, this Court more recently held instead in State v. Wheless that a prosecutor's closing comment "'that in order to find [the defendant] innocent, the police of Seattle, W.A. [sic], must be lying,' . . . [although] likely improper . . . was not 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'"[7] 103 Wn. App. 749, 758, 14 P.3d 184 (2000). Rich's failure to object therefore waived this issue on appeal.

Finally, even if this court finds that the statement was flagrant and ill-intentioned, Rich has not demonstrated a substantial likelihood that the argument affected the verdict; thus, error under

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[6] It is worth noting that the comment that actually *was* before the court in Wright is wholly incompatible with the facts of this case. If the prosecutor here was restricted to the type of comment actually addressed in Wright, she would be limited to saying that to believe Rich, the jury would have to believe that three police officers had been mistaken about her state of intoxication, that Mulligan had been mistaken about following a car for four blocks, and the owner of the stolen car was mistaken about not being in a romantic relationship with Rich. In light of the evidence, such an argument could not be made with a straight face.

[7] State v. Anderson, another case cited by Rich, also held that a prosecutor's argument that the jury had to come up with a reason "in order to find the defendant not guilty" was not "so flagrant or ill-intentioned that an instruction could not have cured the prejudice" even though it was misconduct and arguably placed a condition on acquittal. The court assumed the jury followed the jury instruction explaining the burden of proof. 153 Wn. App. 417, 426, 431-32, 220 P.3d 1273 (2009).

that standard would be harmless. Thorgerson, 172 Wn.2d at 442-43. With the exception of Fleming,[8] not even the cases cited by Rich involving statements that conditioned acquittal on a finding of perjury on behalf of the State's witnesses required reversal. In Barrow, for example, this Court declined to reverse because it reasoned that the jury had the opportunity to hear the testimony for themselves and "it does not appear to us that the prosecutor's improper argument would have the capacity to so inflame the jury that there is a substantial likelihood that the defendant was denied a fair trial." 60 Wn. App. at 878.

In Castaneda-Perez, where the State "persistently" tried to push defense witnesses to say that the officers were lying, the court gave several reasons why that behavior posed no substantial likelihood of affecting the verdict: the witnesses never answered the prosecutor affirmatively; the police officers' testimony was

[8] It is critical to note that even Fleming did not reverse based on the "acquittal/ lying witness" argument alone. Indeed, the court found that although such a comment was flagrant and ill-intentioned, it constituted a "misstatement of the law," not a constitutional error. 83 Wn. App. at 215. It was the prosecutor's *additional* statements, including a bald challenge to the defendants' refusal to testify, that improperly shifted the burden of proof and infringed on their constitutional right to remain silent. Id. at 214-15. This raised the standard to a constitutional harmless error standard that, combined with the lack of evidence of forcible compulsion, required reversal. Id. at 215-16. "We conclude that the misconduct, *taken together* and *by cumulative effect*, rose to the level of manifest constitutional error, which we cannot find harmless beyond a reasonable doubt *given the nature of the evidence at trial*." Id. at 216 (emphasis added).

"believable and . . . corroborated"; the defendants' testimony that they had never met each other was "not persuasive" in light of the officers' "persuasive, corroborated" testimony; and the jury had been unable to reach a verdict in the co-defendant's case, indicating they were not affected by the improper arguments.[9] 61 Wn. App. at 360, 363-65.

The remarks to which Rich objects comprised of only a few words in an otherwise unobjectionable argument. The remainder of the discussion accurately described the law, the evidence, and the role of the jury. Additionally, the jury was properly instructed on the burden of proof, the determination of credibility, and the fact that the lawyers' remarks were not evidence. CP 22-25. Defense counsel's own argument began and ended with a reiteration of the State's burden of proof. 2RP 228, 231.

Moreover, the evidence of Rich's guilt presented by the State's three police officers, the toxicologist, and the owner of the Acura MDX was substantial. All the witnesses corroborated one

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[9] It should be noted that it was the prosecutor's numerous and relentless denunciations during cross-examination, in which he accused the defendant of impugning the character of the police, that the Castaneda-Perez court found objectionable; the court included only "part" of the offending testimony in its opinion, which nevertheless included at least a dozen such comments. 61 Wn. App. at 357-59. Such a pattern is not present here. The prosecutor here never made one such comment during Rich's cross-examination, and only a single comment in closing argument. 2RP 192-208. The cases are thus distinguishable on their facts.

another regarding Rich's illegal ownership of the car, her state of intoxication, her loud attempts to cover up her various crimes, and the act of her driving. Rich's claims of denial were not persuasive in the face of all of the testimony above. The fact that the jury did not convict her on the sole felony in the case, Possession of Stolen Vehicle, indicates that they were not affected by any allegedly improper arguments. The same evidence was before it on all charges and the same credibility calls had to be made. Given Rich's acquittal on the felony and the strength of the evidence on the remaining counts, it is unlikely that the jury was influenced to any significant degree by the prosecutor's isolated remark.

Had Rich objected, the court could easily have cured any possible prejudice by repeating or elaborating on the instructions already given. Because she did not, she waived this claim of error.

2. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO MAKE A MISSING WITNESS ARGUMENT.

Rich next contends that the trial court erred in allowing the State to make a missing witness argument at closing because it declined to give the related jury instruction. Because this did not preclude the court from allowing the argument, the doctrine

properly applied to this case. In addition, Rich failed to preserve any error, this claim fails.

a. Rich Failed To Preserve Any Error Because She Did Not Object To The Ruling Or To The State's Argument.

On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009); RAP 2.5(a)(3). The Supreme Court has "adopt[ed] a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." 166 Wn.2d at 82. Furthermore, "'a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.'" Id. at 83 (citations omitted).

Rich did not adequately preserve this issue because she failed to object at the trial level. 2RP 212. Rich objected solely to the State's motion to include WPIC 5.20, the missing witness instruction, which was made outside the presence of the jury. 2RP 209, 211. Following the denial of that motion, the trial court ruled that it would allow the State to argue the issue at closing. To this ruling, Rich remained silent. 2RP 212.

Nor can Rich successfully claim that she preserved the issue by earlier lodging an objection to the giving of WPIC 5.20. 2RP 211. That objection was limited solely to the subject of jury instructions, and was therefore the specific ground on which the objection was based. 2RP 209-12. This is proven by defense counsel's own framing of the issue before making his own: "Are we arguing the missing witness instruction now?" 2RP 211. The trial court's denial of the motion to give the instruction and its subsequent allowance to argue the doctrine at closing were two separate rulings, both offering Rich the opportunity to address any alleged irregularity at that point. Rich chose to object only to the jury instruction but not the closing argument. 2RP 211-12.

Rich argues that an objection during closing argument would have been "futile" because she had already demonstrated her opposition and the court had already made its ruling; thus, her failure to object should therefore not preclude review. App. Br. 14. But this contention has no support legally or in the record. Rich objected only to the giving of the *instruction*, and the court ruled only on that issue. When the court moved on to the issue of allowing the argument during closing remarks, Rich remained silent. She faced no impediment to making an objection at that

time, especially given the fact that the conference was held outside the presence of the jury. 2RP 208-12. Because a party may only assign error on the specific ground of the evidentiary objection made at trial, Rich waived this issue.

Nor does State v. Fisher, cited by Rich, justify the lack of an objection. 165 Wn.2d 727, 202 P.2d 937 (2009). In Fisher, the trial court made a 404(b) ruling on a specified ground and the State disregarded the ruling during trial; because of the initial ruling *on the same grounds* at pretrial and defense counsel's *additional step of making a standing objection*, the reviewing court found the objection was not waived. Id. at 748 n.4. That is not the case here. Rich thus waived the objection and cannot raise it now on appeal.

b. The Trial Court's Decision Not To Give A Missing Witness Jury Instruction Did Not Preclude The Court From Allowing The State To Argue The Doctrine At Closing.

Should this Court find that Rich adequately preserved her objection, it should hold that the trial court neither erred in its ruling nor that the State committed prosecutorial misconduct. The court's denial of the instruction did not preclude it from allowing argument on the issue.

A trial court's ruling on improper prosecutorial argument is reviewed for abuse of discretion. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). A trial court abuses its discretion if its "'decision is manifestly unreasonable or is based on untenable reasons or grounds.'" State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008) (citations omitted).

Under the missing witness rule, a party may comment on the opposing party's failure to call a witness and infer that she would not so fail unless that witness's testimony would be damaging to her. State v. Blair, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). In order to make this argument, it must be shown as a matter of reasonable probability that a witness was particularly available to the opposing party; that a party would not have failed to call the witness unless that person's testimony would be damaging; the testimony is not cumulative or unimportant; the witness's absence cannot be satisfactorily explained; no privilege exists; and the witness's testimony would not (in the event it was favorable to the opposing party) be self-incriminatory. Id. at 488-90.

The doctrine has been memorialized in WPIC 5.20.[10] Although the trial court in this case declined to give the formal instruction to the jury and affirmatively allowed it to be argued in oral argument, Rich does not cite to any cases that prohibits this. To the contrary, in Cheatam, our supreme court found no error when a lower court allowed the State to invoke the doctrine in closing argument but declined to give the instruction to the jury, just as the trial court did here.[11] 150 Wn.2d at 652-53 (holding simply that "[i]f the prosecutor properly invokes the missing witness doctrine, no prosecutorial misconduct occurs.").

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[10] WPIC 5.20 Failure to Produce Witness: "If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that: (1) The witness is within the control of, or peculiarly available to, that party; (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant; (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness; (4) There is no satisfactory explanation of why the party did not call the person as a witness; and (5) The inference is reasonable in light of all the circumstances."

[11] In other cases addressing the missing witness rule, courts do not appear to make an issue of whether the rule is raised in argument or in the jury instructions, or whether a decision on one controls the other. In the lead case of Blair, for example, it does not appear that anyone requested or made a pretrial ruling prior to the prosecutor's comments at closing. The supreme court nonetheless upheld the prosecutor's use of the rule. 117 Wn.2d at 483-84, 491-92.

c. The Missing Witness Doctrine Applied.

Despite the trial court's finding that the State had not met the requirement of "peculiar availability" in this case, it did not elaborate as to why. 2RP 212. It is nonetheless clear that the State met all the requirements of the missing witness doctrine.

The requirement of "peculiar availability" to a party does not refer to the witness's presence in court or their being subject to the subpoena power. Blair, 117 Wn.2d at 490. Rather, it means that "there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify . . . except for the fact that his testimony would have been damaging." Id. In Blair, a close personal or business relationship satisfied this requirement. Id.

The reviewing court in Cheatam similarly found that because a defendant and his alibi witness both worked for the defendant's aunt, that witness was "peculiarly available" to him and the State could explore why he had not been called. 150 Wn.2d at 653. The supreme court rejected Cheatam's complaint that the State could have located the witness itself, holding that "being peculiarly

available to a party does not mean that if the other party could call the witness, the doctrine is inapplicable." Id. Rather, "availability is to be determined based upon the facts and circumstances of that witness's relationship to the parties, not mere physical presence or accessibility." Id.

Here, there were sufficient grounds to establish that the missing witnesses were "peculiarly available" to Rich: much more than mere co-workers as in Cheatam or a personal/business acquaintance in Blair, they were members of Rich's own family. Rich herself told the trial court that her sister and brother-in-law, Kyra Lewis and Ayeshia Lewis, were both outside in the parking lot and "seen everything. I believe one of my brothers has the video." 2RP 34-36. At trial, she testified that one sister had driven the Acura MDX from Delridge to Ambaum after "Mohamed" had voluntarily lent the vehicle to her, and that the car remained parked on Ambaum outside that sister's house for nine days. 2RP 187-89. Rich further insisted that when the police pulled up on May 27, her brothers "were coming out to fix my wheelchair, to take me around the car" when the police pulled up, and that "they had a video

camera of everything that was going on." 2RP 191. These witnesses were clearly peculiarly available to Rich.[12]

A court can affirm a lower court's judgment on any ground within the pleadings and proof. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997); Ertman v. City of Olympia, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) ("where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition"). Although the trial court here erroneously found that the availability requirement had not been met, there is sufficient evidence in the record demonstrating that the State satisfied that condition. By holding that the missing witness rule justifies the closing argument in this case, this Court

[12] Although the trial court noted only that the State had not met the availability factor, implying that the State had satisfied the other prongs of the rule, a cursory examination clearly establishes that the State met all of the elements. The testimony was obviously important, as one of the biggest points of contention was whether Rich had been driving the car; by her own admissions, the missing members of Rich's family would have attested to that and even allegedly had a video. Further, the testimony could not have been cumulative because no one else testified on Rich's behalf and no other evidence corroborated her story. Next, the witnesses' absence could not be satisfactorily explained; Rich personally provided a phone number for Kyra Lewis, who she claimed could also contact Ayeshia Lewis, and defense counsel obviously knew the address of the sister who lived on Ambaum since it was discussed in court. The only logical explanation was that the witnesses had no favorable testimony, especially given the fact that one sister had apparently hung up on defense counsel. There was also no evidence that any of the witnesses were not competent to testify or had a privilege. Nor was there any indication that the siblings' testimony, if favorable to Rich, would incriminate them in any crimes.

would be in accord with the principle that it outlined earlier in State v. Contreras regarding the missing witness rule:

> When the defendant attempts to establish his theory of the case by alleging the corroborating testimony of *an uncalled witness*, the prosecutor is entitled to attack the adequacy of the proof, pointing out weaknesses and inconsistencies, including the lack of testimony which would be integral to the defendant's theory. This is particularly justified when the defendant bears a special relationship to a potential witness. When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence

57 Wn. App. 471, 476, 788 P.2d 1114 (1990) (emphasis added).

Because the facts fully supported a missing witness argument, the trial court properly allowed the State to make one.

d. Rich Cannot Show Prejudice From Any Error Allowing The State To Make A Missing Witness Argument.

Should this Court find the missing witness doctrine did not apply, Rich still cannot establish prejudice from the alleged misconduct.

In State v. Gregory, the court held that the prosecutor misapplied the missing witness rule when he pointed out to the jury the absence of the suspect to whom the defense team was

assigning blame for the crime; such an inference was improper given the obviously self-incriminatory nature of that witness's potential testimony. 158 Wn.2d 759, 845, 147 P.3d 1201 (2006). The court nevertheless held that the error was harmless because defense counsel had never objected or requested a curative instruction, "which could have easily reminded the jury of the proper burden of proof," nor did the comment constitute flagrant and ill-intentioned conduct. Id. at 846.

Furthermore, unlike Montgomery, where the prosecutor repeatedly invoked the absence of a witness the court had explicitly deemed as *not* qualifying as a missing witness, in addition to obtaining an erroneous missing witness instruction for yet another witness, the prosecutor here mentioned the missing witness only once and mentioned the video twice. 163 Wn.2d at 596-97, 599; 2RP 226 ("She told you a few mintues ago that her brothers and sisters knew about it . . . [and] [h]er brother took a video of the whole thing . . . 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 .18?" and "Where is that video?").

Rich cannot establish a substantial likelihood that these brief comments affected the verdict. Her bare contention that "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 DUI and reckless endangerment is insufficient. App. Br. 15. The court's "confidence" is not the standard and Rich has not established the required prejudice.

3. THE EVIDENCE WAS SUFFICIENT TO FIND THAT RICH COMMITTED RECKLESS ENDANGERMENT.

Rich challenges the sufficiency of the evidence of her conviction for reckless endangerment, claiming that the State failed to prove beyond a reasonable doubt that her actions created a substantial risk of death or serious physical injury to another person. This argument fails because the State produced sufficient evidence for a rational trier of fact to find that Rich, by speeding with a BAC of more than twice the legal limit and a 7 to 8-year-old child in the front seat, while exhibiting significant signs of intoxication, created a substantial risk of death or serious physical injury to another.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every

element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the State. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence exists in the record to support the conviction. Id. at 718.

RCW 9A.76.160(1) states: "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.08.010(1)(c) defines recklessness as follows: "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."

The evidence presented at trial was sufficient to permit a rational trier of fact to find that Rich knew that by driving while intoxicated, she was disregarding a substantial risk that her conduct created a substantial risk of death or serious physical injury to another person. Although she tried several times to deny her level of intoxication, she testified that she was both "drunk" and "tipsy." 2RP 294, 206. She also exhibited behavior acknowledging consciousness of guilt by loudly instructing the young child in her front seat to lie to the police, say she had not been driving, and hide the keys. 2RP 79-80, 144-45. She also tried to downplay the amount of alcohol she had consumed to Trooper Leifson, an amount she later changed at trial. 2RP 122, 201.

The evidence also supports a finding that Rich's actions grossly deviated from conduct that a reasonable person would exercise in the same situation. Her BAC level was .18 one and a

half hours after the incident, more than twice the legal limit at which a toxicologist testified that all people are impaired in terms of their ability to drive. 2RP 133. Given the alcohol burnoff rate, this would mean her BAC at the time of driving was over .20. This level of intoxication creates a litany of impairments which translate into substantial risk of death or serious physical injury to others: slowed brain activity, cognitive confusion, poor coordination, delayed response time and judgment. 2RP 132-33, 138.

These consequences were not merely theoretical; they manifested themselves in reality. Three officers noted Rich's significant level of impairment, including her glassy/watery eyes, her manner of staring as if she did "not [know] what was going on," her abnormally loud speech to the child who was right next to her, her inability to realize that she could easily be heard by officers 20 feet away, erratic and inconsistent statements that were "all over the place," the "very strong odor of intoxicants" on her breath, mood swings, inability to even get pieces of paper for Trooper Leifson, and repetitive questions and slurred speech. 2RP 80-81, 110-18, 146. Her decision to drive with a young child in the passenger seat despite these obvious signs of significant cognitive impairment

constituted a gross deviation from reasonable conduct and created a substantial risk of death or physical serious injury to others.

Contrary to Rich's contention that she was speeding "somewhere between 36 miles per hour and 50 miles per hour," Deputy Copeland clearly noted that he was driving 35 miles per hour when she passed him, and that he had to speed up to 50 miles per hour simply to catch up to her; this indicates Rich was going *at least* 50 miles per hour, while intoxicated to twice the legal limit, with documented cognitive impairment, with a small child in her front seat. 2RP 75. Rich created a substantial risk of death or serious physical injury to that child.

Rich concedes that she drove while under the influence but argues that "this fact alone" does not satisfy the conclusion that she created a substantial risk of death or physical injury to another. App. Br. 17. It was not, however, "this fact alone" that supported the jury's verdict– it was her high level of intoxication *plus* the fact that she was speeding 15 miles above the speed limit with a small child in her car. Nevertheless, Rich cites to several cases to argue the premise that driving while intoxicated *by itself* does not satisfy the "substantial risk of death or serious physical injury" prong. The

cases she cites, however, all address different crimes that are not at issue here.

In State v. Amurri, the court addressed whether driving under the influence can by itself constitute *reckless driving*. 51 Wn. App. 262, 753 P.2d 540 (1988).[13] Nor does City of Bellevue v. Redlack shed any relevant light on the issue claimed by Rich; it discusses the relationship between DUI and the crime of negligent driving. 40 Wn. App. 689, 700 P.2d 363 (1985). State v. Potter is similarly inapplicable to the sufficiency of the evidence in Rich's case; it analyzes whether double jeopardy applied to reckless endangerment and reckless driving under the facts of that case. 31 Wn. App. 883, 645 P.2d 60 (1982). Finally, Rich cites to State v. Randhawa, which discussed the propriety of a jury instruction allowing an inference of the element of "driving in a reckless manner" from excessive speed in a case of vehicular homicide. 133 Wn.2d 67, 941 P.2d 661 (1997). Rich does not explain how any of these cases support her contention that evidence of driving under the influence alone cannot satisfy the "substantial risk" prong of the crime of *reckless endangerment*.

[13] The elements of reckless endangerment and reckless driving, a traffic offense, are not the same. RCW 46.41.500: " Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

Although Rich argues that "evidence besides driving under influence in the presence of another person . . . is required to prove reckless endangerment," she then goes on to introduce the additional evidence that she was speeding. She further argues that speeding on its own is insufficient to prove reckless endangerment. App. Br. 18-19. Rich fails to see the futility of arguing that the two pieces of evidence that established her reckless conduct would be insufficient *on their own* to support the charge, because by dint of her own argument she admits that those two pieces of evidence were present *together*. As she notes, speeding is by law prima facie evidence of reckless driving. RCW 46.61.465. It is in Amurri, cited by Rich, where the court found that speeding 10 m.p.h. above the speed limit while under the influence was sufficient evidence to prove the crime of reckless driving. Id. at 267.

Finally, Rich appears to argue that the facts necessary to support a charge of reckless endangerment must involve egregious conduct, such as that in State v. Graham. 153 Wn.2d 400, 103 P.3d 1238 (2005) (defendant drove twice the speed limit, purposely swerved, and ultimately killed one person and injured three others). This argument is without merit. The crime of reckless endangerment by its definition does not require any actual injury,

but rather the substantial *risk* of injury. The court has found sufficient evidence to support a charge of reckless endangerment where a defendant fired a BB gun at a child wearing safety goggles whose injuries were slight. State v. Perez, 137 Wn. App. 97, 151 P.3d 249 (2007).

The evidence was sufficient to establish that Rich created a substantial risk of death or serious physical injury by speeding while highly intoxicated with a child in her car, and this Court should affirm her conviction for reckless endangerment.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Rich's convictions.

DATED this 9 day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to RICHARD LECHICH, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANDREA RICH, Cause No. 70711-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

06/09/14
Date

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