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NO. 91623-3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ANDREA MARIE RICH,

Respondent.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

---

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**A. ISSUES PRESENTED FOR REVIEW**

1. Is the reckless endangerment statute violated where the totality of the circumstances show that a driver disregarded the risk that a small child could be seriously injured, or must there always be "other tangible indicia of unsafe driving" and excessive intoxication?

2. Could a rational jury conclude that Rich created and disregarded a substantial risk of death or injury where she drank the equivalent of nine or ten shots of alcohol, had a blood alcohol level of .188, drove in excess of the speed limit, all while her seven or eight year-old nephew sat on the front seat of the car?

**B. STATEMENT OF THE CASE**

King County Sheriff's Deputy Paul Mulligan was on patrol in a marked car at 8:09 p.m. when he saw a reported stolen car. RP 73-74, 89. He was travelling in the inside lane at about 35 miles per hour and the stolen car passed him in the outside lane. RP 75. He pulled behind the car "and was able to catch up to it at about 50 miles an hour." RP 75. He followed the car for about four blocks without activating his lights or siren because he was waiting for backup. RP 78. The car pulled into the driveway of an apartment

building, the deputy activated his lights, the car stopped, the front door opened, and the deputy got out of his car to wait alongside the stolen car. RP 78-79. He clearly heard Andrea Rich, the occupant, say in a loud voice to the passenger, something to the effect of “[T]ell them we just found the keys and just got in the car.” RP 79. The deputy had kept the car in his constant sight. RP 79. Rich was talking to the passenger and not paying any attention to the deputy, so he simply waited for backup. RP 79-80.

Deputy Copeland arrived as backup within about one minute. RP 143-44, 150. After a third officer arrived one or two minutes later, Rich was arrested. RP 145, 150. She was wearing a boot-like cast. RP 80, 146.

The deputies believed that Rich was intoxicated. RP 80, 146. Deputy Mulligan testified that she was talking loudly to the little boy in the front passenger seat, her eyes were “pretty glassy and watery,” and she stared as if she was “not completely with it, not knowing what was going on.” RP 81. Deputy Mulligan noted that the child in the passenger seat was about seven or eight years old and appeared scared, his heart was racing wildly, and he “wasn’t really sure what to say and what to do.” RP 81. The keys to the car were in the boy’s pocket. RP 82.

Deputy Copeland noted, too, that Rich was speaking to the child "in a whispered tone but very loudly." RP 152. Deputy Copeland interviewed Rich and said "her demeanor was kind of all over the place," she was erratic, her voice was up and down, and she gave contrary stories in a short space of time. RP 146. As she told various stories her speech was slurred. RP 148.

Rich was transported to a police facility where her breath was tested by Washington State Patrol Trooper Jon Liefson. RP 108. He noted that her eyes were bloodshot and watery, she smelled strongly of alcohol, and her speech was repetitive and slurred. RP 110-12. Her moods swung between crying and happy and polite. RP 117. She showed poor coordination by, for example, struggling to get pieces of paper the trooper had requested. RP 117. He categorized the level of alcohol odor as "strong" on a scale that includes medium, strong, and obvious. RP 118. He categorized her level of intoxication as "obvious." RP 118.

Trooper Pedro Zepeda testified that the test results from Rich showed a BAC reading of .183 and a second reading of .188. RP 177. The Washington State forensic toxicologist noted that a person would have to consume about nine to ten shots of standard proof alcohol to achieve a BAC reading of .188. RP 134.

At trial, the trial court noted that the toxicologist's testimony was unlikely to be much disputed because "it's not that important to the defense, since that is not the issue" in this case. RP 98.

Defense counsel confirmed the court's belief, noting, "Normally I would want to do an investigation on the toxicologist to see what the background is. But, that's not the issue in this case." RP 98.

The State initially charged Rich with possession of a stolen vehicle and driving under the influence. CP 1-2. The information was later amended to charge the additional crime of reckless endangerment. CP 6-7. The jury convicted Rich of driving under the influence and reckless endangerment and found by special verdict that she was intoxicated with a BAC higher than .15, but the jury acquitted her of possession of a stolen vehicle.<sup>1</sup> CP 47-50; RP (5/30/13) 2-5.

Rich's trial testimony was, as the Court of Appeals charitably observed, "confusing."<sup>2</sup> She testified that she had only recently emerged from the apartment complex where she was arrested, that she had not been driving beforehand at all, that she had drunk only

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<sup>1</sup> Facts related to the stolen vehicle charge are set forth in the Petitioner's Answer to Cross-Petition for Review and in the Brief of Respondent filed in the Court of Appeals.

<sup>2</sup> The trial court found Rich's pretrial testimony to be "internally inconsistent, inconsistent with her prior statements, and not credible." CP 19.

a single shot of alcohol, and that the arresting officer simply turned his car around in front of the apartment complex and, for no apparent reason, came over and arrested her. RP 184, 190. According to Rich, her "little nephew" was coming out to give her the keys as police pulled up. RP 190-91.

On cross-examination, Rich confirmed that her blood alcohol was at about .188 and that she knew the legal limit to drive was .08. RP 194. She agreed that she was drunk but claimed she was not affected. Id. She changed her story on cross-examination and said she had two shots and some Mike's Hard Lemonade. RP 201-04. She admitted she was "tipsy" and that she was drinking 80 proof shots. RP 206. She confirmed that her nephew had been in the car. RP 198.

Because this was Rich's third DUI conviction and her blood alcohol level was over .15, she faced a minimum 120-day sentence. RP (7/26/13) 4.<sup>3</sup> The State requested an additional 30 days of jail time based on the fact that Rich had placed an eight-year-old child at risk. RP (7/26/13) at 2. The court imposed consecutive terms of 120 days on the DUI and 20 days on the reckless endangerment. RP (7/26/13) at 4.

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<sup>3</sup> Rich also had a prior conviction for Hit and Run, Attended, in 2005. See CP 3.

The Court of Appeals reversed the reckless endangerment conviction in a published decision. State v. Rich, 186 Wn. App. 632, 347 P.3d 72 (2015). It held that “[b]ecause the State failed to prove beyond a reasonable doubt that Rich recklessly engaged in conduct that created a substantial risk of death or serious injury to another person, the reckless endangerment conviction must be vacated.” Rich, 186 Wn. App. at 835-36. The court held that to establish “endangerment” the risk of injury must be real, “not merely hypothetical or conjectural.” Rich, at 644.

Although the State never argued for “per se” liability, the Court of Appeals relied on a case from Pennsylvania to argue that “there is no ‘per se’ liability for reckless endangerment based on proof of violation of the DUI statute.” Id. at 645 (citing Commonwealth v. Mastromatteo, 719 A.2d 1081 (Pa. Super. 1998)). The court quoted at length from Mastromatteo to suggest that using the reckless endangerment statute in conjunction with a driving while intoxicated prosecution was an attempt by “zealous prosecutors” to expand crimes “to encompass criminal conduct which the offense was not designed for...” Id. The Court of Appeals held that “the State did not present evidence from which the trier of fact could infer that Rich’s driving created a risk of death

or serious physical injury that was considerable or substantial” or that her level of intoxication was particularly high. Id. at 647. The State's petition for review was granted and Rich's cross-petition for review was denied.

**C. ARGUMENT**

The Court of Appeals erroneously held that the State was required to prove exceptionally bad driving or an especially high level of intoxication in order to prove reckless endangerment in this case. Although bad driving and high intoxication are relevant to the risk of injury, neither factor is dispositive. The ultimate question for a jury is whether the totality of the evidence proved “a substantial risk of death or physical injury to another person.”

The Court of Appeals also failed to dutifully apply the test for sufficiency of the evidence. It almost completely ignored the most salient fact in the case, that a small child was forced to ride along with a drunken woman in her car, and it understated the evidence of intoxication and speed. When a person drives with a blood alcohol content twice the legal limit, speeds, passes cars on the right, and does so with a small child in the front seat, a reasonable

jury could conclude that the person has recklessly created a substantial risk of serious physical injury to the child.

1. RECKLESS ENDANGERMENT MAY BE PROVED USING ANY CONSTELLATION OF FACTS ESTABLISHING THE REQUISITE RISK OF HARM.

The Court of Appeals correctly recognized that legislative intent determines the quantum of evidence required to establish reckless endangerment. Rich, 186 Wn. App. at 645-46. The court erred, however, in analyzing the intent of the legislature.

The clearest indicator of legislative intent is found in the statutory language. "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.76.160(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 Court has previously observed that reckless endangerment is "quintessentially a crime against persons" that centers on the risk of harm to a person.

State v. Graham, 153 Wn.2d 400, 407, 103 P.3d 1238 (2005)

(quoting Albrecht v. Maryland, 105 Md. App. 45, 58, 658 A.2d 1122 (1995)).<sup>4</sup>

The Court of Appeals did not take the “person-centered” approach required by the statute. Instead, the court carved away the identity and nature of the person who is placed at risk, and separately analyzed the conduct that created risk for that person. The court said that “[t]he presence of a passenger in the vehicle satisfies the victim element of the crime, but is not itself the endangering conduct.” Rich, at 642.<sup>5</sup> This was error. It goes without saying that an identifiable person must be placed at risk to have a violation of the reckless endangerment statute, but the identity of the person in the crime is relevant to any assessment of the nature and extent of a risk created by the defendant’s conduct. A defendant could create unacceptable risk for a child or an elderly person by acting in a way that would not be present a risk to an able-bodied adult. The court erred in analyzing Rich’s driving and her drinking in a vacuum rather than as parts of the totality of the

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<sup>4</sup> Graham drove with three passengers in her car and recklessly caused a crash that killed one person and injured the others. This Court held that, because the statute was designed to focus on “a person,” each person placed at risk was a separate unit of prosecution that could be punished separately. Graham, 153 Wn.2d at 408.

<sup>5</sup> The court also said that “[t]he State conflates culpability, conduct, and victim elements of reckless endangerment.” Rich, at 641.

evidence. This approach caused the court to weigh the evidence in a manner wholly different from the way a jury would have weighed it. The jury quite properly considered the risk that Rich's driving and drinking created for the child who was forced to ride in her car.

The Court of Appeals' focus on egregious driving and excessive intoxication apparently stems from the reasoning of a single decision from an intermediate court of appeals in Pennsylvania that has not been cited in any other state. Rich, at 645 (citing Commonwealth v. Mastromatteo, 719 A.2d 1081 (Pa. Super. 1998)). Mastromatteo drove "in a relatively slow fashion and never came close to any other vehicles," and "drifted over the middle line on three occasions," while she had her "young son" in the car. She also had an alcoholic drink in the front seat with her, exhibited signs of being under the influence, failed field sobriety tests, and had a BAC reading of .168 and 570 nanograms per deciliter of marijuana in her blood. The Pennsylvania intermediate appellate court held that

... driving under the influence of intoxicating substances does not create legal recklessness per se but must be accompanied with other tangible indicia of unsafe driving to a degree that creates a substantial risk of injury which is consciously disregarded. ...

\* \* \*

Although certainly these drivers are more likely to be involved in an accident than if they were completely sober, the percentage of chance of them causing injury is still relatively remote and would not create “a substantial risk” of death or serious bodily injury as is found in the relevant sections of the Crimes Code. ...

\* \* \*

Although it certainly seems politically correct to crack down on drunk driving and although a drunk driver is more likely to get into a collision than if sober, the percentage chance of an accident is not sufficiently high enough<sup>6</sup> to bring it within the purview of the crime of reckless endangerment unless it is shown that the driver exhibited reckless driving behavior or other indicia of incapacity that would create a substantial likelihood of an accident occurring.

Mastromatteo, 719 A.2d at 1083-84. The court identified no language in the relevant Pennsylvania statute that would preclude a jury from making a finding of reckless endangerment by virtue of having a child in the car; it simply concluded from state precedent that the endangering conduct must derive from poor *driving*.<sup>7</sup>

Subsequent Pennsylvania decisions reach different results under only slightly different facts, illustrating the malleability of the court’s “other tangible indicia of unsafe driving” standard. See Commonwealth v. Sullivan, 864 A.2d 1246 (Pa.Supr.Ct. 2004)

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<sup>6</sup> The appellate court did not identify the source for these conclusions about probability, or whether the legislature had made any such findings.

<sup>7</sup> The Pennsylvania statute is, indeed, similar to Washington’s statute. It provides: “A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” 18 Pa.C.S.A. § 2705.

(driving a quarter mile in the wrong direction on an off-ramp while in an unfamiliar area and while intoxicated was tangible indicia of unsafe driving sufficient to establish the mens rea for conviction under reckless endangerment equivalent); Commonwealth v. Jeter, 937 A.2d 466 (Pa.Supr.Ct. 2007) (intoxicated driver met the higher mens rea – willful and wanton disregard – for reckless *driving* conviction); Commonwealth v. Hutchins, 42 A.3d 302 (Pa.Supr.Ct. 2012) (driver who was high on marijuana with his three young children in the car turned left in front of an oncoming car and caused an accident that injured the children was not driving poorly enough to establish recklessness).

Hutchins, 42 A.3d at 312. This novel Pennsylvania rule is not required by Washington's reckless endangerment statute and the rule has led to peculiar and unpredictable results in Pennsylvania. It should not be imported into Washington law.

Under Washington's statute, the focus should be on whether the defendant's conduct created a substantial risk of injury to a person, considering the totality of the circumstances, including the vulnerability of the person placed at risk. The Court of Appeals erred when it truncated the analysis by focusing primarily on driving

and intoxication, independent of the nature of the person placed at risk.

The Court of Appeals was apparently concerned that failure to create an elevated standard of proof would encourage an overly zealous reaction on the part of prosecutors or trial court judges.

Rich, 645 (quoting Mastromatteo). That concern is unwarranted.

The issue is perhaps best understood by examining the relationship between three distinct crimes – DUI, reckless driving, and reckless endangerment – that sometimes overlap in the context of drunken driving.

Reckless driving and reckless endangerment are charged where the evidence shows criminal conduct more egregious than the typical DUI, but neither crime is proved simply by establishing the elements of a bare DUI. Most people who drive under the influence of alcohol or drugs are not convicted of reckless driving because they do not drive with “willful or wanton disregard for the safety of persons or property.” RCW 46.61.500. Likewise, many people who drive under the influence do not “create[] a substantial risk of death or serious physical injury to another person,” because their intoxication is not sufficiently great, or there are no people in the immediate vicinity, or their driving is not appreciably bad, so

they do not commit the crime of reckless endangerment simply because they are driving under the influence of alcohol or drugs.<sup>8</sup> If, however, there is evidence of driving in a “willful and wanton” manner, or if the defendant’s driving and intoxication place a person at risk, then a separate conviction for reckless driving or reckless endangerment may be appropriate. But, prosecutors will have to prove additional elements to obtain convictions for those crimes. Proof of DUI does not *per se* prove either of the other crimes. The Court of Appeals’ approach is unnecessary to curb potential abuses by prosecutors or judges.

The Court of Appeals also observed that the risk of endangerment must be an “actual one.” Rich, slip op. at 11. This statement does not, however, further the analysis. *Any* risk must be real, rather than fanciful. And reckless endangerment is, by its very character, an inchoate offense that deals with potentialities, not actualities. Graham, at 407. The crime must be contrasted with “the entire range of consummated crimes from which ... [it] is

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<sup>8</sup> Reckless driving and reckless endangerment are distinct offenses with different elements. And, reckless endangerment is not specifically a driving offense; it is found in the general criminal code of Title 9A RCW rather than in the vehicular code at Title 46 RCW. Unlike reckless driving, nothing in the reckless endangerment statute requires a certain quantum of proof regarding the manner of driving. A defendant may not be punished for both reckless driving and reckless endangerment arising out of the same set of facts. State v. Potter, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982).

either one step removed (no actual harm) or two steps (neither actual harm nor intent to harm).” Id. (quoting Albrecht v. Maryland, 105 Md. App. 45, 58, 658 A.2d 1122 (1995)). But the jury was in the best position to assess whether this child was in danger; the Court of Appeals seems to have elevated the proof required in the statute, contrary to the plain language of the statute.

2. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT RICH PLACED A CHILD AT SUBSTANTIAL RISK OF DEATH OR SERIOUS INJURY.

The standard of review on a challenge to the sufficiency of the evidence is well known. A reviewing court is to presume the truth of the State's evidence and all inferences are to be drawn in a light most favorable to the verdict. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The decision below did not faithfully apply that standard. Rich, at 647-48.

As already noted, the court below erred by failing to properly consider the most salient fact, to wit: that a seven or eight year-old boy was sitting in the front seat of Rich's car as she drove drunk.<sup>9</sup> This fact is a critical part of the interplay between the driving and the intoxication that creates a risk of injury in this case.

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<sup>9</sup> Rich never contradicted the two officers' testimony as to the child's age and she referred to him as her "little nephew."

It almost goes without saying that children riding with a drunk driver are particularly vulnerable. A child usually cannot choose whether or not to ride with an intoxicated adult, he may not appreciate the fact that the driver is drunk, he cannot dissuade the adult from driving, he cannot coax her to slow down, he cannot choose where in the car to sit, he cannot cinch his seatbelt more tightly, he may not be able to brace himself or take other defensive measures if he sees an impending crash, he cannot abandon the car at a stoplight if he is uncomfortable with the situation, and he may also be at greater risk of injury from safety equipment like seatbelts and airbags simply by virtue of his size. This should have been an important factor in the court's analysis, but it was not.

The Court of Appeals also devalued the evidence of intoxication. The evidence showed that Rich was driving at more than twice the legal threshold for intoxication. RP 177. The toxicologist's unrebutted testimony was that to achieve a blood alcohol level of .188 she must have consumed nine to ten shots of standard proof alcohol. RP 134. Rich admitted that she had been drinking but gave quite different accounts of what she had consumed. RP 184, 194, 201-06. She was talking loudly upon contact with officers, she slurred her speech, she repeated herself,

her eyes were bloodshot and watery, she fumbled with paperwork, she was emotionally unstable, and one officer characterized her intoxication as "obvious." RP 80-81, 110-18, 146-48, 169. The toxicologist testified about the effects of alcohol generally. RP 132-33, 138. These facts proved impairment far beyond that necessary to prove the offense of DUI, and certainly sufficient for a rational juror to conclude that Rich's conduct placed her nephew at great risk.

The Court of Appeals also took the evidence of deficient driving in the light most favorable to the defendant, instead of at face value. The evidence showed that Rich passed a marked patrol car on the right while exceeding the speed limit. A natural inference from this fact is that Rich failed to recognize the marked patrol car as she passed it, strongly suggesting impairment of judgment and carelessness. She was exceeding the 35 mph speed limit to the extent that the deputy sheriff had to pull behind the car "and was able to catch up to it at about 50 miles an hour." RP 75. Although this statement is arguably ambiguous as to whether Rich was driving at 50 mph or whether the deputy simply had to increase his speed to 50 mph to catch up with her, the trial court – which heard the testimony live during pretrial hearings – seems to have

interpreted the deputy to mean that Rich was traveling *at* 50 mph. CP 17-18 (the stolen car was “speeding at about 50 mph in the outside lane”). The Court of Appeals erred in interpreting this testimony favorably to the defendant. Thus, if taken in a light most favorable to non-moving party, this evidence suggests that Rich significantly exceeded the speed limit as the deputy followed her for several city blocks.

A child of age seven or eight sitting in a car is only as protected from harm as the adult driver chooses to make him. A reasonable juror could certainly conclude that Rich's little nephew was at substantial risk from Rich's drunkenness, the fact that she was speeding, the fact that she apparently did not realize she was passing a police car on the right, and the fact that she had taken no steps to protect him by, at a minimum, placing him in the rear seat of the car. Her attempts to get the child to lie to police on her behalf indicate she knew exactly what she was doing.<sup>10</sup> This evidence should plainly have passed a sufficiency review as to the elements of reckless endangerment.

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<sup>10</sup> The keys to Rich's car were found in the child's pocket. RP 82.

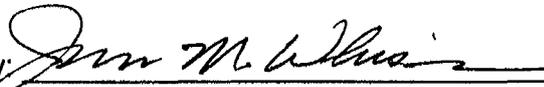
D. CONCLUSION

The Court of Appeals altered the standard for proving reckless endangerment and failed to correctly apply the sufficiency of the evidence standard. Properly considered, the evidence was sufficient to convict Rich. The State respectfully asks this Court to reverse the Court of Appeals and affirm Rich's conviction for reckless endangerment.

DATED this 2<sup>nd</sup> day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

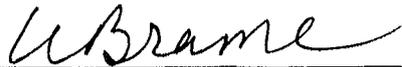
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of October, 2015.



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Please accept for filing the attached documents (Supplemental Brief of Petitioner) in State of Washington v. Andrea Marie Rich, Supreme Court No. 91623-3.

Thank you.

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