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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 40261-1-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

CORY A. SUNDBERG,  
Aka ALLEN L. HUMPHRIES,  
Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
MASON COUNTY

The Honorable Toni A. Sheldon, Judge  
Cause No. 09-1-00384-0

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence on Count I (assault in the second degree) as the road does not constitute a deadly weapon.
2. The trial court erred in not taking the case from the jury for lack of sufficient evidence on Count II (unlawful imprisonment).
3. The trial court erred in allowing the State to commit prosecutorial misconduct by arguing during closing that Marshall's testimony was the truth, which deprived Sundberg of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Sundberg's conviction for assault in the second degree (Count I) beyond a reasonable doubt where the road does not constitute a deadly weapon? [Assignment of Error No. 1].
2. Whether there was sufficient evidence to uphold Sundberg's conviction for unlawful imprisonment (Count II) beyond a reasonable doubt? [Assignment of Error No. 2].
3. Whether the trial court erred in allowing the State to commit prosecutorial misconduct by arguing during closing that Marshall's testimony was the truth, which deprived Sundberg of a fair trial? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Cory A. Sundberg, aka Allen L. Humphries, (Sundberg) was charged by second amended information filed in Mason County Superior Court with one count of assault in the second degree (assault with a deadly

weapon that deadly weapon being the road)—DV (Count I), and one count of unlawful imprisonment—DV (Count II). [CP 78-79].

Sundberg was tried by a jury, the Honorable Toni A. Sheldon presiding. At the conclusion of the evidence, the court denied Sundberg's motion to dismiss Count I (assault in the second degree) for lack of evidence establishing that the road as charged by the State constituted a deadly weapon necessary for a conviction of this crime. [Vol. IV RP 341-346]. Sundberg had no objections and took no exceptions to the court's instructions which instructions included Sundberg's proposed lesser included offense of assault in the third degree regarding Count I (assault in the second degree). [CP 28-54, 58-69, 70-77; Vol. IV RP 346-347]. The jury found Sundberg guilty of assault in the second degree (Count I), and guilty of unlawful imprisonment (Count II). [CP 25, 27; Vol. IV RP 402-404]. The jury also entered a special verdict finding that the crimes were committed against a "family or household member" for purposes of the domestic violence finding. [CP 24; Vol. IV RP 402-404].

The court sentenced Sundberg to a standard range sentence on Count I of 84-months based on an offender score of 9+, and to a standard range sentence on Count II of 50-months based on an offender score of 8 for a total sentence of 84-months. [CP 6-23; Vol. V RP 430-434].

Notice of appeal was timely filed on January 22, 2010. [CP 5].

This appeal follows.

2. Facts

On October 1, 2009, Rebecca Marshall (Marshall) and her boyfriend, Sundberg, were running errands around Belfair in Mason County including getting Marshall's dog's nails clipped and stopping at Jose's Fruit Stand where Sundberg was working. [Vol. I RP 29-31]. The couple eventually went to Sundberg's home, which he shared with his father, Wes Rider (Rider), for the night. [Vol. I RP 31-32]. Marshall ended up sleeping on the sofa in the living room. [Vol. I RP 34]. In the early morning hours of October 2, 2009, Marshall received a phone call from her son, which phone call awakened Sundberg. [Vol. I RP 34-35]. Sundberg became angry and according to Marshall Rider came out of his bedroom telling the two to quiet down then going back to bed. [Vol. I RP 35-36]. Sundberg then ordered Marshall and her dog from his home, and according to Marshall shoved her down the steps of the home throwing her shoes outside after her. [Vol. I RP 35-37].

Frightened, Marshall rested in her truck on Sundberg's property but did not drive away because the truck was not working. [Vol. I RP 38-39]. Eventually, Marshall walked down the road to a nearby construction site. [Vol. I RP 39-40]. Sundberg followed Marshall to the construction

site where they got into a confrontation and Sundberg kicked her in the ribs. [Vol. I RP 38]. Marshall told Sundberg to leave her alone and Sundberg left. [Vol. I RP 38-40]. At dawn, Marshall walked to Auto 3 Wrecking, where she used the business's phone as her cell phone battery was dead. [Vol. I RP 40-41]. Marshall tried to call a number of people and eventually spoke with Sundberg. [Vol. I RP 40-42]. Sundberg agreed to take Marshall to Belfair and picked her up from Auto 3 Wrecking taking her back to his home where he took a shower and cleaned the house. [Vol. I RP 42-45].

Marshall along with her dog and Sundberg then left the house. [Vol. I RP 45]. While he was driving, Sundberg became argumentative with Marshall and missed the turn to Belfair instead heading toward Shelton. [Vol. I RP 45-47]. Marshall was scared and asked Sundberg "twenty, thirty, [times] screaming at the top of [her] lungs" to stop. [Vol. I RP 47]. Sundberg did not stop and began driving faster while Marshall tried to get the attention of other drivers on the road for help. [Vol. I RP 47-49]. As they entered Allyn, Sundberg slowed down because the speed limit is 35 miles per hour and suddenly pushed Marshall out of the car. [Vol. I RP 50-52]. Marshall was hanging onto the seatbelt being dragged alongside the car then let go flying through the air tumbling to a halt on the shoulder of the road. [Vol. I RP 53-54]. Sundberg did not stop and

Marshall was hysterical because her dog was still in the car. [Vol. I RP 54-55].

Laura Woitas (Woitas) was driving through Allyn and saw a woman flying through the air as if she had been hit by a car; she did not see what happened to cause the woman to fly through the air. [Vol. I RP 97-99; Vol. II RP 104]. Woitas stopped to give assistance to the woman (Marshall) and called 911. [Vol. I RP 56, 100; Vol. II RP 102].

Emergency services including the police arrived and Marshall was taken to the hospital. [Vol. I RP 56, 100; Vol. II RP 102, 132-137]. Marshall suffered from bumps and scrapes—“road rash” on her back, leg, arm, and head—but nothing was broken. [Vol. I RP 56-57, 63].

Sundberg was taken into custody later that day and made statements to the police. [Vol. II RP 138-141, 144-145, 153-156, 167-171, 177-182, 197-200; Vol. III RP 205-214, 273-276].

Rider testified that in the early morning hours of October 2, 2009, he did hear Sundberg and Marshall having a loud discussion, got out of bed to tell them to quiet down, and went back to bed. [Vol. II RP 113-115]. He did not see anything that would indicate a physical altercation had or was taking place. [Vol. II RP 114-115].

Sundberg testified in his own defense. Sundberg testified similar to Marshall with whom he had a relationship that the two had run errands

on October 1, 2009, returned to his home that evening, and that she got a phone call in the early morning hours of October 2, 2009. [Vol. III RP 240-248]. After Marshall got the phone call, Sundberg asked Marshall to leave his home. [Vol. III RP 248-251]. He admitted to throwing her shoes out the door but testified that it was Marshall who hit him with her dog's leash; he denied shoving her explaining that she fell out the door down the stairs as she was backing out of the house. [Vol. III RP 252-255]. Sundberg testified that Rider came out of his bedroom upset that he had been awakened. [Vol. III RP 255]. Sundberg did follow her to the construction site but left because Marshall claimed to have a ride; he denied kicking her in the ribs. [Vol. III RP 255-259]. Sundberg further testified that he had received a phone call from Marshall, had gone to pick her up at the wrecking yard, took her home where she helped to clean the house, agreed to give her a ride but that he had some work errands to do first, and that the two left in his vehicle. [Vol. III RP 259-266].

While they were driving, the two began talking which talk escalated into an argument. [Vol. III RP 266-270]. Sundberg testified that Marshall began trying to jump out his car, that he was afraid for her safety because there was no place to safely let her out, that he stopped the car to let her out when he got into Allyn, and that she was yelling at him and hitting his car at which point he drove off and went home. [Vol. III RP

266-272]. Sundberg denied pushing Marshall out of his moving car.

[Vol. III RP 284].

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT SUNBERG WAS GUILTY OF ASSAULT IN THE SECOND DEGREE (COUNT I) AS THE ROAD DOES NOT CONSTITUTE A DEADLY WEAPON.

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 would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Sundberg was charged by second amended information with the crime of assault in the second degree in Count I as follows:

In the County of Mason, State of Washington, on or about the 2<sup>nd</sup> day of October, 2009, the above-named defendant, CORY AMES SUNDBERG, AKA ALLEN L. HUMPHRIES, did commit ASSAULT IN THE SECOND DEGREE—DV, a Class B felony, in that said defendant did intentionally assault another person, to-wit: Rebecca Ann Marshall, with a deadly weapon, to-wit: the pavement, contrary to RCW 9A.36.021(1)(c); and furthermore, the defendant did commit the above crime against a family or household member, contrary to RCW 10.99.020 and against the peace and dignity of the State of Washington.

[Emphasis added]. [CP 78].

As instructed by the court in Instruction No. 11, in conformity with the charging language for Count I, the State bore the burden of proving beyond a reasonable doubt the following:

- (1) That on or about October 2, 2009, the defendant assaulted Rebecca Marshall with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

[Emphasis added]. [CP 41; Vol. IV RP 351-352].

The court also instructed the jury in Instruction No. 9 on the meaning of “deadly weapon” as follows:

Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

[CP 39; Vol. IV RP 351].

As instructed in order to obtain and uphold the conviction for Count I, the State bore the burden of proving beyond a reasonable doubt that Sundberg assaulted Marshall with a deadly weapon, which as charged and argued by the State was the road. [CP 78; Vol. IV RP 341-344, 362-364, 366, 377, 392]. This is a burden that the State cannot satisfy because the road does not constitute a deadly weapon.

The sum of the evidence elicited at trial supporting this count is the testimony of Marshall that Sundberg was driving at approximately 35 miles per hour and pushed her out of the moving car after which she suffered bumps and scrapes—“road rash” on her back, leg, arm, and head—but nothing was broken. [Vol. I RP 50-52, 56-57, 63]. While Sundberg denied that he pushed Marshall out of a moving car instead testifying that he stopped the car before she got out, [Vol. III RP 266-272, 284], this court must considering the evidence in the light most favorable to the State, which demonstrates that the road does not constitute a deadly weapon in that it was not the road in the circumstances in which it was used that created the risk of death or substantial bodily harm; the road was simply there and Marshall landed on it. There was no deadly weapon involved as what created the potential for death or substantial bodily harm was the fact that Marshall was pushed from a moving car even though she suffered only minor injuries.

In State v. Marohl, 151 Wn. App. 469, 213 P.3d 49 (2009), *review granted* 167 Wn.2d 1020, 224 P.3d 774 (2010)<sup>1</sup>, this court upheld the defendant's conviction for assault in the third degree by finding that the defendant slamming the victim to the barroom floor causing injuries satisfied the third degree assault element of "the physical injury [being] caused by a weapon or other instrument." It was the combination of the defendant using his hands to actually slam the victim's head against the floor that apparently satisfied this court as to the "weapon element." Unlike Marohl, there was no evidence presented that Sundberg slammed Marshall into the pavement; she fell onto the pavement when she was pushed from the car. Under the circumstances established by this case, which differ from those in Marohl, it cannot be said that the road constituted a deadly weapon for purposes of satisfying that element of assault in the second degree.

The State did not charge nor did it argue any other means for committing assault in the second degree in Count I save that it was committed with a deadly weapon (the road), which does not constitute a deadly weapon as argued herein. Since there is complete lack of evidence on the deadly weapon element as charged by the State, Sundberg's

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<sup>1</sup> This court should note that oral argument before the State Supreme Court in State v. Marohl apparently occurred on September 21, 2010. The issue before the State Supreme Court, similar to the issue presented herein, is whether the floor is "a thing likely to produce harm."

conviction cannot stand. This court should reverse and dismiss Count I (assault in the second degree).

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT SUNDBERG WAS GUILTY OF UNLAWFUL IMPRISONMENT(COUNT II).

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 would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Sundberg was charged with and convicted in Count II of unlawful imprisonment. [CP 25, 79]. As instructed by the court in Instructions No.

20, the State bore the burden of proving beyond a reasonable doubt the following:

- (1) That on or about October 2, 2009, the defendant restrained the movements of Rebecca Marshall in a manner that substantially interfered with her liberty;
- (2) That such restraint was
  - (a) without Rebecca Marshall's consent or
  - (b) accomplished by physical force, intimidation, or deception; and
- (3) That such restraint was without legal authority; and
- (4) That with regard to elements (1), (2), and (3), the defendant acted knowingly; and
- (5) That any of these acts occurred in the State of Washington.

[CP 50; Vol. IV RP 354-355].

As instructed, the State bore the burden of proving beyond a reasonable doubt that Sundberg restrained Marshall. This is a burden that the State cannot satisfy.

The sum of the evidence to on this count is the testimony of Marshall that Sundberg refused to let her out of his car when she repeatedly demanded that he do so scaring her. [Vol. I RP 47-49]. Marshall testified that she yelled at the top of her lungs twenty to thirty times for Sundberg to let her go trying to get the attention of other drivers to come to her assistance but Sundberg just drove faster. [Vol. I RP 47-

49]. However, Sundberg testified that he and Marshall were arguing, that she attempted to jump out of the car causing him to be concerned for her safety, and that he stopped the car letting Marshall out as soon as it was safe—he did not “restrain” Marshall for purposes of unlawful imprisonment. [Vol. III RP 266-272]. The State has failed to establish beyond a reasonable doubt that Sundberg was guilty of unlawful imprisonment (Count II). This court should reverse and dismiss Sundberg’s conviction on this count.

(3) THE STATE’S ARGUMENT DURING CLOSING THAT MARSHALL’S TESTIMONY WAS THE TRUTH CONSTITUTED PROSECUTORIAL MISCONDUCT, WHICH DEPRIVED SUNDBERG OF A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be

directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

It is improper for a prosecutor to state a person belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *citing* State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Moreover, it is improper for a prosecutor to vouch for or against the credibility of a witness. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as the veracity of the witness.... State v. Ish, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 3911355 (October 7,

2010). Whether a witness has testified truthfully is entirely for the jury to determine. United States v. Brooks, 508 F.3d 1205, 1210 (9<sup>th</sup> Cir. 2007).

When a defendant fails to object to a comment made by a prosecutor in closing argument, the alleged misconduct will not be reviewed unless the comment is so flagrant and ill intentioned as to cause an enduring and resulting prejudice that could not have been remedied by a curative instruction. State v. Smith, 144 Wn.2d 665, 679, 30 P.3d (2001); *see also* State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

In the instant case, during closing argument, the State made the following improper argument:

Now credibility. I'll touch on this more, but I want to—I want to talk about it while we're here. I guess. You observed all the witnesses testify. That was your job. I saw you guys taking notes. You were doing a good job of that. I know there was—there was quite a few witnesses. You saw Rebecca Marshall testify. She gave statements at the time of the incident, a number of statements she testified. And those statements and her testimony were consistent with one another, for the most part. There's going to be some inconsistencies in any testimony and statements for a number of reasons. But for the most part, she was consistent. Her story never changed because it was the truth.

[Emphasis added]. [Vol. IV RP 359]. Sundberg did not object.

The comment in closing by the State improperly stated the prosecutor's belief in the truth of Marshall's testimony and improperly vouched for her credibility. Sundberg's convictions for assault in the

second degree (Count I) and unlawful imprisonment (Count II) largely rested on the testimony of two witnesses—Sundberg and Marshall. These were the only two persons present during the actual acts that formed the basis for both crimes. The jury’s determination of who to believe, either Sundberg or Marshall, was essential to deciding the matter, and any improper argument influencing the jury’s determination on this crucial credibility issue should be construed as ill intentioned and flagrant in disregard to Sundberg’s right to a fair trial that could not be remedied with a curative instruction even had Sundberg timely objected. This court should find that the State committed prosecutorial misconduct, that the misconduct warrants reversal despite Sundberg’s failure to object given that it was flagrant and ill intentioned misconduct of such a fundamental nature—no one is allowed to vouch for a witness’s credibility or opine as to the veracity of any witness—in a case that largely rested on the jury’s determination of credibility. Sundberg’s convictions should be reversed.

E. CONCLUSION

Based on the above, Sundberg respectfully requests this court to reverse and dismiss his convictions.

DATED this 11<sup>th</sup> day of October 2010.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11<sup>th</sup> day of October 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 11<sup>th</sup> day of October 2010.

Patricia A. Pethick  
Patricia A. Pethick