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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY JW
DEPUTY

No. 40261-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORY A. SUNDBERG,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge
Cause No. 09-1-00348-0

RESPONSE BRIEF

MONTY D. COBB
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TABLE OF CONTENTS

A. APPELLANT’S ASSIGNMENT OF ERROR.....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	2
E. CONCLUSION.....	6

TABLE OF AUTHORITIES

Cases

<i>State v. Belgrade</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	5
<i>State v. Bryant</i> , 89 Wn.App. 857, 950 P.2d 1004 (1998).....	5
<i>State v. Holt</i> , 119 Wn.App. 712, 82 P.3d 688 (2004).....	2
<i>State v. Marohl</i> , 151 Wn.App 469, 213 P.3d 49 (2009).....	3
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986)	5
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	5
<i>State v. Stevenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	5
<i>State v. Walton</i> , 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) <i>review denied</i> , 119 Wash.2d 1011, 833 P.2d 386 (1992).....	4

Rules

RAP 10.3.....	1
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A. APPELLANT'S 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 is sufficient evidence to support the jury 's finding of guilt on Counts I and II (Jeremy Boyles, victim). [Assignment of Error 1 and 2].
- 2). Whether the prosecutor's argument was so flagrant and ill-intentioned that it could not have been remedied by a curative instruction. [Assignment of Error 3].

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts recitation of the procedural and substantive facts as set forth in Appellant's opening brief.

D. ARGUMENT

1. THERE IS SUFFICIENT EVIDENCE TO FIND SUNDBERG GUILTY OF BOTH COUNTS CHARGED.

The Court of Appeals applies the familiar test laid out in *State v. Holt*, 119 Wn.App. 712, 82 P.3d 688 (2004)¹ which succinctly sets out the considerations when sufficiency of the evidence is raised on appeal:

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Was.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, we give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992).

The court properly instructed the jury that “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 bodily harm.” Jury Instruction 9 [CP 39].

Sundberg argues that the road cannot be a deadly weapon in this case asserting that the event that creates the risk of injury or death is being pushed from the car. Appellant’s Brief at 9. That misses the mark in that the potential for injury or death comes not from the act of being pushed from the car but from how and what a person hits when they land, in this case the road.

Pushing someone from a car is likely at least an assault fourth degree—an unwanted touching. But where, as here, the testimony is that the car is moving 35 miles per hour when the victim was pushed out, it is a reasonable inference that the potential for serious injury or death comes from the impact with the roadway, not from the intermediate act of being pushed from the car.

While Sundberg attempts to distinguish *State v. Marohl*, 151 WnApp. 469, 213 P.3d 49 (2009), *review granted* 167 Wn2d. 1020 (2010), the argument is misplaced. Here, as in *Marohl*, it is the manner and circumstances of the event that dictate whether the floor or the road can be a deadly weapon as defined in the jury instruction cited above. For example, if the car had been stationary when the victim was pushed from the car a jury might conclude that the road was not a deadly weapon as used or attempted to be used. In this case it is just as reasonable that the

¹ Overruled in part by *State v. Easterlin*, 126 Wn.App. 170, 107 P.3d 773 (2005), *aff’d on*

jury concluded the road was a deadly weapon as used or intended to be used given the car was moving and moving at more than a slow speed.

It is important to remember that the actual injuries incurred are not dispositive as to whether an item is or is not a deadly weapon. The instruction is clear that the item only be “readily capable” of causing death or bodily harm. The fact that there are injuries supports the jury’s conclusion that here the road was indeed a deadly weapon.

Likewise, the evidence is sufficient that the victim was unlawfully restrained by Sundberg. Even taking the facts as outlined in Appellant’s Brief, the evidence is sufficient in that the victim testified she yelled 20-30 times, tried to get the attention of passersby, and that Sundberg drove faster. While this may conflict with Sundberg’s version that he pulled over to let the victim out as promptly as it was safe, it is up to the jury to decide and this court should defer to the triers of fact for credibility determinations. . *State v. Walton*, 64 WnApp. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

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other grounds, 159 Wn.2d 203 (2006).

2. THERE IS SUFFICIENT EVIDENCE TO FIND
SUNDBERG GUILTY OF BOTH COUNTS CHARGED.

An appellate court reviews allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Bryant*, 89 Wn.App. 857, 873, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999).

In closing arguments, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Stevenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). But a criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986).

Where the defendant did not object at trial, the misconduct must be so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Obviously it was not appropriate for the deputy prosecutor here to argue that “her story never changed because it was the truth.” RP 359. Was the statement was flagrant and ill-intentioned? The prosecutor made the statement one time and moved on, never repeating the mistake. The jury had been instructed by the court that they were the sole judges of credibility and to disregard any remark or argument made by the attorneys that was not supported by evidence. [RP 348-349, Instruction 1].

Sundberg has not shown that the erroneous remark could not have been remedied by a curative instruction. While he asserts that this trial is all about credibility, the victim’s injuries which are consistent with her testimony take this out of a pure “he said—she said” credibility battle.

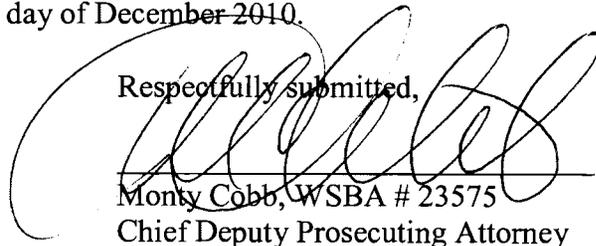
In short, the report of proceedings shows that the error that did occur was neither flagrant nor ill-intentioned. Sundberg has not shown that a curative instruction would not have obviated the impact of the error.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the convictions.

DATED this 6th day of December 2010.

Respectfully submitted,



Monty Cobb, WSBA # 23575
Chief Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 40261-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
CORY A. SUNDBERG,)	
)	
Appellant,)	
_____)	

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 STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION II
 BY _____
 DEPUTY

I, MARGIE OLINGER, declare and state as follows:

On December 7, 2010, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (RESPONSE BRIEF), to:

Patricia A. Pethick
P.O. Box 7269
Tacoma, WA 98417

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 7th day of December, 2010, at Shelton, Washington.



 Margie Olinger

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