

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

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41052-4-II  
NO. 41025-4

STATE OF WASHINGTON,

Respondent.

vs.

JEREMIAH B. DUNNING,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY \_\_\_\_\_  
DEPUTY

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On Appeal from the Superior Court of Lewis County

**STATE'S RESPONSE BRIEF**

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## COUNTERSTATEMENT OF THE ISSUES

1. The defendant shoved the victim so hard that she flew back three feet into a wall, fracturing her wrist and her first lumbar vertebra. Was the evidence sufficient for the jury to conclude that the defendant intentionally assaulted her and thereby recklessly inflicted substantial bodily harm?
2. The victim, who was much smaller than the defendant, admitted raising her hands towards him and perhaps touching his face. Was the evidence sufficient for the jury to conclude that the defendant's shove was not lawful force in self-defense?
3. The victim sustained fractures of her distal right radius and her first lumbar vertebra. Did the prosecutor commit flagrant and ill-intentioned misconduct when she referred to these injuries as a "broken wrist," "broken back," or "broken bones"?

## INTRODUCTION

Jeremiah Dunning appeals his conviction of assaulting his live-in girlfriend, Tony Coverdale, in the second degree. After an argument, Dunning shoved Coverdale so hard that she flew back three feet into a wall. Coverdale fractured her wrist and her first lumbar vertebra. Dunning unsuccessfully claimed self-defense at trial. On appeal, he argues that the evidence was insufficient to prove the crime's mens rea and to disprove self-defense. He also argues that the prosecutor committed misconduct by referring to Coverdale's vertebral injury as a "broken back." The Court should deny these claims and affirm Dunning's conviction.

## STATEMENT OF THE CASE

On December 26, 2009, Tony Coverdale and Jeremiah Dunning went to Tugboat Annie's in Olympia, Washington for a concert. Verbatim Report of Proceedings (VRP) at 20-22. Both there and at a previous bar, Coverdale saw Dunning drink alcohol. *Id.* at 22, 26. By the end of the evening, Coverdale thought Dunning was intoxicated. She refused to let Dunning drive and insisted that she drive. *Id.* at 26-27, 62. Dunning initially refused but then relented. *Id.* at 27. On the car ride back to Onalaska, where the two lived together, Dunning and Coverdale argued about her insisting on driving. Dunning was angry because he believed Coverdale had embarrassed him in front of his friends; he yelled and swore at her. *Id.* at 28. The argument lasted for 40 minutes, but cooled down as the two approached home. *Id.* at 29.

Coverdale went to the back room of the house to give each of them "some space." *Id.* She decided to leave the house for the night and began packing a bag. *Id.* at 30-31. Dunning followed her, continuing to express anger that Coverdale embarrassed him. In frustration, Coverdale put her hands up toward Dunning, telling him to shut up and leave her alone. *Id.* at 31-32.

Coverdale demonstrated this gesture for the jury. *Id.* at 31-32. She said she was “motioning for him to leave me alone.” *Id.* Dunning was one or two feet away. *Id.* at 33. Coverdale put her hands up toward Dunning’s face, but she did not hit him. She said that she might have touched him, but could not remember. *Id.* at 31-33; 82-83. Coverdale was 5 feet, 3 inches tall and weighed 140 pounds. *Id.* at 33. Dunning was much larger. *See id.* at 127, 138.

Dunning then shoved Coverdale in the chest very quickly. *Id.* at 33. Coverdale’s feet left the ground; she flew back about three feet, hitting a plant and the wall behind her. *Id.* at 34, 93, 95. Immediately upon landing, she felt pain. *Id.* at 34. She was in too much pain to get up. *Id.* at 35-36. She told Dunning that she needed to go to the hospital, but Dunning did not take her or call an ambulance. *Id.* at 36. Eventually, Coverdale made it to her bed, but she could not get up during the night to use the bathroom. *Id.*

Coverdale again requested that Dunning call an ambulance. *Id.* at 38. This time Dunning called, but before help arrived he spoke with Coverdale about how she should describe the accident. *Id.* at 36-39. To avoid getting Dunning in trouble, Coverdale told the medical personnel that she slipped and fell. *Id.* at 38-39, 98.

The doctor diagnosed Coverdale's injuries as a fracture of her right distal radius and a compression fracture of her first lumbar vertebra. An X-ray confirmed the lumbar fracture. *Id.* at 98. The doctor did not rule out a prior back injury as the fracture's cause, *id.*, but Coverdale was not in pain and her back and wrist were not fractured before Dunning shoved her. *Id.* at 95.

A few days after returning from the hospital, Coverdale moved out of Dunning's house and reported the incident to law enforcement. *Id.* at 46-47. An officer interviewed her and contacted Dunning. *Id.* at 100-02. After being read his constitutional rights, Dunning said he was aware of the assault Coverdale described to the officer. He admitted pushing Coverdale and said he knew of her injuries. *Id.* at 103-04.

The State charged Dunning with domestic-violence assault in the second degree under RCW 9A.36.021(1)(a), "intentionally assault[ing] another and thereby recklessly inflict[ing] substantial bodily harm." Clerk's Papers (CP) No. 1. Dunning claimed self-defense at trial. *Id.* at 69-70; 141-42. The parties agreed that self-defense instructions should be given to the jury. *Id.* at 110-11.

During closing argument, the State referred to Coverdale's fractures as evidence of a forceful, intentional shove, the substantiality of Coverdale's injuries, and the extent to which Dunning used more force than necessary. *Id.* at 120-29, 152. The State argued that it was not reasonable for Dunning to fear injury from Coverdale's hand gesture and that his response exceeded lawful force in self-defense. *Id.* at 126-29. The prosecutor referred to Coverdale's fractured right distal radius as a "broken wrist" and her fractured first lumbar vertebra as a "broken back." *Id.* at 130. The State sometimes summarized these injuries by saying that the victim broke her wrist and her back. *Id.* at 127-28. A few times, the prosecutor argued that Dunning "broke [the victim's] back," or "broke her bones." *Id.* at 122, 129, 149. The defense attorney also used the term "broke a back," but argued that the doctor could not determine whether Coverdale's back injury predated Dunning's shove. *Id.* at 131-32.

The jury convicted Dunning, who was sentenced to six months in jail. *Id.* at 155-59, 171-72. Dunning now appeals.

## ARGUMENT

- I. The State produced evidence sufficient to prove that Dunning intentionally, unlawfully assaulted Coverdale and thereby recklessly inflicted substantial bodily harm.

To determine the sufficiency of the evidence to convict, the court views the evidence in the light most favorable to the State. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Circumstantial and direct evidence receive equal weight; all reasonable inferences from the evidence are interpreted against the defendant. *Id.* The ultimate issue is “whether any rational trier of fact could have found guilt beyond a reasonable doubt.” *Id.*

- A. The evidence was sufficient to prove that Dunning intentionally assaulted Coverdale and recklessly inflicted substantial bodily harm upon her.

It was undisputed that Dunning shoved Coverdale so hard that her feet left the ground and she flew back three feet into a plant and the wall. VRP at 34, 93, 95. Dunning admitted doing so. *Id.* at 103-04. His claim at trial was not that he had unintentionally shoved Coverdale, but that he had done so in self-defense. *See id.* at 141-42. Based on Coverdale’s testimony and the extent of her injuries, the State argued that Dunning had shoved her hard enough that a reasonable person would be aware of the risk of

substantial bodily harm and Dunning had recklessly disregarded that risk. *Id.* at 125-26.

The jurors were instructed that, to convict Dunning of second-degree assault, they had to determine that Dunning intentionally assaulted Coverdale and thereby recklessly inflicted substantial bodily harm. CP No. 47 (instructions 5-9); see also *State v. Trout*, 125 Wn. App. 403, 420, 105 P.3d 69 (Div. 3 2005) (“The jury is presumed to follow the court’s instructions.”); *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (noting that jury instructions not objected to become law of the case).

Taking the evidence in the light most favorable to the State, the jury could find that Dunning intentionally shoved Coverdale because he was angry that she had embarrassed him in public, was packing to leave, and had told him to shut up. Dunning was much bigger than Coverdale and pushed her very hard, sending her flying. The impact broke Coverdale’s wrist and one of her vertebra. The jury could easily find that the risk of this substantial bodily harm was foreseeable from such a forceful assault, and that Dunning grossly deviated from a reasonable person’s actions in disregarding that risk by shoving Coverdale.

The jury could further conclude that Dunning was conscious of his guilt. He initially refused to take Coverdale to the hospital and only called for help when Coverdale agreed to lie to the medical personnel about how she sustained her injuries. Dunning was aware that he would get into trouble for his actions, showing that he knew he had committed a crime.

Therefore, the evidence was sufficient to prove that Dunning intentionally assaulted Coverdale and thereby recklessly inflicted substantial bodily harm.<sup>1</sup>

B. The evidence was sufficient for the jury to conclude that Dunning's use of force was unlawful.

Because Dunning raised self-defense as an issue, the State bore the burden of disproving lawful force beyond a reasonable doubt. See CP No. 47 (instruction 13, requiring such proof). The jury instructions provided that the defendant could lawfully employ force in self-defense if he reasonably believed he would be injured and he used the force a reasonably prudent person would have employed under the circumstances. See *id.* (paraphrased).

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<sup>1</sup> The defense brief confuses the mens rea of second-degree assault with that of first-degree assault, which requires intent to inflict great bodily harm. The appropriate mens rea as to the bodily harm is recklessness. RCW 9A.36.021(1)(a). The jury was instructed accordingly. CP at 47 (instructions 5-9).

Taking the evidence in the light most favorable to the State, Dunning could not reasonably have feared he would be injured by Coverdale's hand gesture. See VRP at 126-27 (arguing the point in closing). Coverdale was much smaller than Dunning, perhaps too short to reach his face. *Id.* at 33, 127, 138. Her gesture was merely a motion toward him, not a punch or something that could have caused harm. *Id.* at 31-33. Coverdale couldn't remember touching Dunning at all. *Id.* at 31-33; 82-83. The jury could conclude that she did not touch him and could not have done so. Dunning therefore had no reason to fear injury.

In addition, Dunning exceeded the amount of force a reasonable person would have used under the circumstances. *Id.* at 127-29. Dunning could have blocked Coverdale's hands, stepped aside, or lightly pushed her away. Instead, Dunning shoved Coverdale hard enough to send her flying three feet back into the wall. *Id.* at 34, 93, 95. She suffered two fractures and considerable pain. *Id.* at 34-36, 98. The jury could infer that this violent shove, in light of the defendant's much greater size and strength, was excessive.

The jury had ample material upon which to reject the defendant's claim of self-defense and find the appropriate mens rea. The evidence was sufficient to prove that Dunning intentionally and unlawfully assaulted Coverdale, recklessly inflicting substantial bodily injury. Dunning's conviction should be affirmed.

II. The prosecutor was well within appropriate bounds of argument when referring to the victim's injuries.

After Dunning shoved Coverdale, she sustained fractures of her right distal radius and her first lumbar vertebra. VRP at 33-36, 95, 98. The lumbar fracture was confirmed via X-ray. *Id.* at 98. The doctor did not rule out a prior back injury as the lumbar fracture's cause, but Coverdale testified that she had not been in pain nor had these injuries prior to the assault. *Id.* at 95, 98.

During closing argument, the prosecutor referred to Coverdale's injuries as evidence that Dunning's shove was an intentional assault (not in self-defense), and that he recklessly inflicted substantial bodily harm upon Coverdale. *Id.* at 120-29, 152. The prosecutor did not always refer to the injuries by their formal medical names. Sometimes, she referred to them as a "broken wrist" and "broken back," described the victim as having

broken her wrist and back, or argued that the defendant “broke [the victim's] back.” *Id.* at 122, 127-30, 149.

Dunning contends that the prosecutor committed misconduct by using these terms. To obtain a reversal, the defendant must show that the prosecutor’s conduct was both improper and prejudicial. *State v. Trout*, 125 Wn. App. 403, 417, 105 P.3d 69 (Div. 3 2005). When, as here, the defendant did not object at trial, the misconduct will be redressed only if it is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937(2009) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). Generally, “the prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence.” *Trout*, 125 Wn. App. at 417.

The prosecutor’s argument in this case was well within the appropriate realm. The evidence showed that the victim fractured her radius and first lumbar vertebra. “Fracture” is defined as “to cause a fracture in: BREAK <*fracture* a rib>.” Merriam Webster Dictionary, *available at* <http://www.m-w.com>. The radius is a bone in the forearm and wrist, and the first lumbar vertebra is a bone in

the back. See "Skeleton," illustration 1, Medline Plus Medical Dictionary, National Institute of Health, *available at* <http://www.nlm.nih.gov/medlineplus/mplusdictionary.html>. It was a reasonable inference from the medical evidence to say that Coverdale broke her wrist and her back, or alternatively that she had a broken wrist or broken back. The prosecutor had no obligation to use the arid medical term "fracture of the first lumbar vertebra" when arguing to the jury. See *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997) (permitting the prosecutor to use "strong, but fair" characterizations of the evidence).

The State's argument that Dunning broke Coverdale's back was also reasonable. Again, the evidence showed that before Dunning shoved her, Coverdale was not in pain and did not have fractures of her wrist and back. *Id.* at 95. After the shove, Coverdale felt pain immediately upon hitting the ground; she was immobilized with pain. *Id.* at 34-36. When she got to the hospital shortly thereafter, the doctor found fractures in her wrist and spine. *Id.* at 98. One can reasonably infer causation from these facts. Thus, notwithstanding the doctor's inability to rule out a prior cause for the lumbar fracture, the State was entitled to argue that Dunning

caused Coverdale to fracture her vertebra—i.e., he broke her back. See *Trout*, 125 Wn. App. at 417 (granting the prosecutor “wide latitude in drawing and expressing reasonable inferences from the evidence”). The fact that this phrase packs punch does not make it misconduct. See *Brown*, 132 Wn.2d at 566.

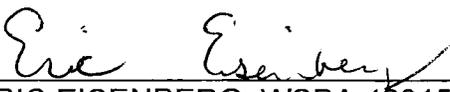
In short, the prosecutor’s argument involved only rudimentary inferences from the evidence. It was not improper, let alone flagrant and ill-intentioned misconduct. Because there was no error, the court should affirm Dunning’s conviction.

### **CONCLUSION**

Dunning shoved his live-in girlfriend so hard that she flew back three feet into a wall, fracturing her wrist and her first lumbar vertebra. The State produced ample evidence by which the jury could conclude that this shove was an intentional assault, not justified in self-defense, and that Dunning thereby recklessly inflicted serious bodily harm. The prosecutor’s closing argument put medical jargon into lay terms and argued that Dunning caused Coverdale’s broken back, both reasonable summations of the evidence. Because no error occurred below, the court should affirm Dunning’s conviction.

RESPECTFULLY SUBMITTED this 8 day of February, 2011.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) NO. 41025-4  
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vs. )  
JEREMIAH B. DUNNING, ) DECLARATION OF  
Appellant. ) MAILING  
\_\_\_\_\_ )

Ms. Sherri Heilman, paralegal for Eric Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 8, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DIVISION II

DATED this 8<sup>th</sup> day of February, 2011, at Chehalis, Washington.

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Lewis County Prosecuting Attorney Office