

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

CORY AMES SUNDBERG,
AKA ALLAN L. HUMPHRIES,
Appellant.

No. 42071-6-II

UNPUBLISHED OPINION

Van Deren, J. — Cory A. Sundberg appeals the trial court’s refusal to grant his motion for a new trial after his conviction for unlawful imprisonment.¹ RCW 9A.40.040. Sundberg alleges that the trial court improperly ruled that new post-trial evidence was merely impeaching and did not require retrial. We affirm.²

FACTS

Sundberg’s conviction arose from a dispute with Rebecca Marshall. Marshall testified that on the morning of October 2, 2009, Sundberg picked her up at a wrecking yard after she called him and requested a ride. They went to Sundberg’s house and later left in his car so Sundberg could drive Marshall to Belfair, Washington. In the car, they argued. Marshall asserted that

¹ In an earlier unpublished opinion, we reversed Sundberg’s conviction for second degree assault and upheld his conviction for unlawful imprisonment. *State v. Sundberg*, noted at 164 Wn. App. 1018 (2011), *review denied*, noted at 173 Wn.2d 1022 (2012).

² A commissioner of this court initially considered Sundberg’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

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Sundberg turned and headed away from Belfair and told Marshall he was “going to take [her] back where he got [her] from.” Report of Proceedings at 19. Marshall was frightened and asked Sundberg to stop the car, which he refused. She waved her hand out the window to try to get someone’s attention and she kept asking Sundberg to stop. He eventually pushed her from the moving vehicle.

In an interview with police after the incident, Sundberg stated that they argued in the car and that Marshall was upset and demanded that he let her out of the vehicle. When he did not let her out, she started to open the car door and said she was going to jump. They continued to argue and Marshall continued demanding that she be let out of the vehicle but Sundberg kept driving. At some point, Marshall opened the door completely and undid her seatbelt. Sundberg then pulled over and let her leave the car.

At trial, Sundberg testified that he offered Marshall a ride to Belfair but instead headed to Allyn, Washington, to run an errand. Marshall opened the door to the moving vehicle and wanted to get out. She closed the door and he locked the windows to try to get her to stay in the vehicle. Marshall opened the door a second time and Sundberg was able to get the door closed and locked. Marshall then unlatched her seatbelt and Sundberg pulled over and told her to get out. The jury convicted Sundberg as charged.

On October 18, 2010, Sundberg brought a motion for a new trial under CrR 7.8 alleging that after trial, new witnesses heard Rebecca Marshall state that she did not tell the truth at trial. He included two declarations, one from Patrice Friedman, who stated that Marshall told her that Sundberg did not push Marshall from the moving vehicle, but that he pulled Marshall out of the car after he stopped the vehicle and Marshall then jumped on the vehicle’s hood as he drove

away. Ryan Kelly's declaration said that Marshall related that Sundberg "really hadn't pushed her out" of the car but that she got out herself and then jumped on Sundberg's car to stop him from driving away. Clerk's Papers at 392.

ANALYSIS

We review the denial of a motion for a new trial for abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). Here, Sundberg asserts that he was entitled to a new trial due to the discovery of new evidence. We will not grant a new trial unless the moving party "demonstrates that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

The declarations presented by Sundberg serve to impeach Marshall's testimony primarily on the manner in which she got out of Sundberg's car. Generally, newly discovered evidence that functions solely to impeach a trial witness is insufficient to grant a new trial. *Williams*, 96 Wn.2d at 223 (citing *State v. Edwards*, 23 Wn. App. 893, 898, 600 P.2d 566 (1979)); *see also State v. Sublett*, 156 Wn. App. 160, 193-94, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010).

But, if the new evidence directly contradicts a key witness's uncorroborated testimony on an element of the offense, the new evidence may support granting a new trial. *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996), *overruled on other grounds by State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003). Sundberg argues that Marshall's testimony was uncorroborated as to all elements of the crime charged.³ He asserts, therefore, that *Savaria* requires a new trial.

³ Because we reversed Sundberg's assault conviction, we address Sundberg's claims only as they apply to the unlawful imprisonment conviction.

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82 Wn. App. at 837-38.

Both Sundberg’s post-arrest statement and his trial testimony, however, corroborate Marshall’s testimony that she repeatedly asked to get out of the car and that Sundberg refused to stop and allow her to leave. *See* RCW 9A.40.040 (“A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.”). *Savaria*, therefore, does not control. 82 Wn. App. at 838.

Because the new declarations serve merely to impeach Marshall’s testimony about how she left the vehicle but do not impeach any element of the crime of unlawful imprisonment, the trial court acted within its discretion to deny Sundberg’s motion for a new trial.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, J.