Supreme Court No. 96646-0
Court of Appeals No. 76632-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KAREN KLEINSMITH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Karen Kleinsmith requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Karen Kleinsmith*, No. 76632-5-I, filed November 13, 2018. A copy of the opinion is attached in an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A prosecutor is under an obligation to ensure that, in the course of prosecuting an individual, that individual receives a fair trial. Even where a defendant does not object to misconduct, she is denied her right to a fair trial where a prosecutor commits flagrant and ill-intentioned misconduct. Here, the deputy prosecuting attorney asked its witnesses to opine on the complaining witness's credibility and misstated the law of the case during closing argument by urging the jurors to convict based on the number of times they had heard the complaining witness's story. Should this Court accept review where the prosecutor's misconduct permeated the trial and incurably prejudiced the jury?

2. All essential elements of a crime must be included in the "to-convict" instruction. Intent is an essential element of assault. Should this Court grant review where the trial court denied Ms. Kleinsmith's request to include the intent element in the to-convict instruction in violation of Ms. Kleinsmith's constitutional right to a fair trial?

C. STATEMENT OF THE CASE

Sara Trowbridge left her apartment one afternoon to pick up a package. RP 308. As she approached the stairwell in the apartment building, she heard a woman say, "[g]et the fuck out." RP 309. Ms. Trowbridge turned to see a woman standing in the hallway, holding a large butcher knife against her chest. RP 309, 316. Ms. Trowbridge immediately focused on the knife. RP 315. The woman tapped the knife against her chest, yelled "[d]on't come back," and walked toward Ms. Trowbridge. RP 309.

Ms. Trowbridge ran down the stairs to the building's office, where she recounted the incident to Hannah Weber, the building's assistant community director. RP 248, 254. Ms. Weber guessed the woman with the knife was Karen Kleinsmith, who lived next door to Ms. Trowbridge. RP 254. The women directed police to Ms. Kleinsmith's apartment. RP 276. Ms. Kleinsmith did not initially come to the door, but after police entered her apartment she was cooperative and explained she had been sleeping. RP 277, 280. The officers placed Ms. Kleinsmith under arrest for second degree assault. RP 280; CP 16.

When a detective went into her apartment to retrieve some items for Ms. Kleinsmith, he found a steak knife in her sink. RP 282-83. The State showed Ms. Trowbridge a photograph of the steak knife shortly

before trial and Ms. Trowbridge testified the woman in the hallway was holding the steak knife found in Ms. Kleinsmith's kitchen, rather than a butcher knife as Ms. Trowbridge originally reported. RP 315-16, 325, 327. Ms. Trowbridge identified Ms. Kleinsmith as the woman she had seen in the hallway as Ms. Kleinsmith was led out of the building by police. RP 341. However, Ms. Trowbridge acknowledged Ms. Kleinsmith's clothing was different than what the woman in the hallway had been wearing. RP 323.

At trial, the prosecutor elicited Ms. Trowbridge's account of the alleged events from all of its witnesses, including Ms. Weber and three members of law enforcement. RP 253-54, 275, 299, 334. The State then asked two of its witnesses to testify about how consistent Ms. Trowbridge's story remained during each recitation. RP 261, 341.

The trial court suggested the parties add language to the jury instruction to inform the jury that "[t]he weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it." RP 361. The parties agreed to this instruction but, in closing argument, the State urged the jury to convict based on the number of times it had heard Ms. Trowbridge's story. RP 362, 401.

Ms. Kleinsmith requested the jury be instructed on all of the elements and the definition of second degree assault in the "to-convict"

instruction. CP 22. Although the defense proposed such an instruction, and the trial court carefully crafted its own instruction in accordance with the defense's request, the trial court ultimately denied Ms. Kleinsmith's motion and simply instructed the jury it should convict Ms. Kleinsmith of assault if it found she "assaulted" Sara Trowbridge. CP 31, 49; RP 381.

The jury found Ms. Kleinsmith guilty as charged. CP 29. On appeal, the State conceded it erroneously elicited inadmissible testimony against Ms. Kleinsmith at trial but the Court of Appeals affirmed. App. at 4, 10.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review because the prosecutor's misconduct denied Ms. Kleinsmith her constitutional right to a fair trial.

Prosecutors serve an important function "as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because "[d]efendants are among the people the prosecutor represents," the prosecutor is under an obligation to ensure a defendant's right to fair trial is not violated. *Id.*; *see also Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

The State concedes the prosecutor was wrong to elicit testimony from multiple witnesses at Ms. Kleinsmith's trial that the complaining witness, Sara Trowbridge, told a consistent story about her encounter with the woman in the hallway. Resp. Br. at 5. Although Ms. Kleinsmith's counsel did not object to this testimony, she is still entitled to relief if she can show the prosecutor's repeated misconduct had a "cumulative effect" that was "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); *see also State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015). That showing was made here.

a. <u>The prosecutor repeatedly committed misconduct when he asked two of the witnesses to opine on the credibility of the complaining witness.</u>

Five witnesses testified for the State at Ms. Kleinsmith's trial. Each testified to the events of the alleged incident despite the fact Sara Trowbridge was the only witness with personal knowledge of what happened. RP 247, 275, 299, 309, 334.

Sara Trowbridge testified at length about her observations. RP 309-15, 320-22. Hannah Weber, the assistant community director for the apartment building, recounted the incident to the jury as told to her by Ms. Trowbridge. RP 247, 253-54.

After confirming Ms. Weber was present when Ms. Trowbridge gave a formal statement to police, the prosecutor also elicited the following from Ms. Weber:

> Q: And, again, did you hear what Ms. Trowbridge said during that statement?
>
> A: I did.
>
> Q: Did that appear to be substantially consistent with what she had said?
>
> A: Word for word, exactly the same.
>
> ….
>
> Q: And how many times at that point, how many times do you think you had heard Ms. Trowbridge explain what happened?
>
> A: At that time, four or five, because there was a few different officers asking, and then there was the statement that she had made.
>
> Q: And during each one of those times, did you hear any differences, any inconsistencies?
>
> A: Absolutely not.
>
> Q: Very good. Thank you very much, Ms. Weber. I have no further questions at this time.

RP 261.

Three members of the Kirkland police department also testified. RP 272, 295, 331. In response to the prosecutor's questions, each officer described the incident in detail again, as told by Ms. Trowbridge and Ms.

Weber. RP 275, 299, 334. Detective Carlson explained the story he recounted to the jury was "a hybrid explanation between Ms. Weber and Ms. Trowbridge." RP 333-34.

The three officers testified: (1) Ms. Trowbridge left her apartment to collect a piece of mail; (2) she heard a woman shouting profanities and was surprised to turn and find the profanities were directed toward her; (3) the woman was holding a knife; (4) the woman yelled at Ms. Trowbridge again; (4) Ms. Trowbridge was frightened and ran; (5) the woman holding the knife was standing in the doorway of Ms. Kleinsmith's apartment. RP 275-76, 299, 355. Detective Carlson, the State's final witness, added that the woman with the knife "pursued [Ms. Trowbridge] for some distance down the hallway." RP 334.

The prosecutor asked Detective Carlson if Ms. Trowbridge's statement ever changed, and Detective Carlson answered: "No. They were extremely consistent throughout." RP 341. He further testified Ms. Trowbridge "provided a description" of the woman in the hallway when the officers first arrived and "provided an identical description afterwards." RP 341.

As the State conceded, asking multiple witnesses to opine on Ms. Trowbridge's credibility, by testifying to how consistent her story was each time she repeated it, constituted misconduct. *Jerrels*, 83 Wn. App. at

507; *see also State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005); App. at 4. As the Court of Appeals has held in other circumstances, such repeated, flagrant misconduct necessitates reversal. *See Boehning*, 127 Wn. Ap. at 524; *Jerrels*, 83 Wn. App. at 507.

b. The prosecutor misstated the law of the case when he told the jury it should find Ms. Kleinsmith guilty because the jury had heard Ms. Trowbridge's consistent story from multiple witnesses.

A prosecutor also commits misconduct when he misstates the law. *State v. Venegas*, 155 Wn. App. 507, 525, 228 P.3d 813 (2010). Here, the prosecutor committed misconduct when he misstated the law of the case during closing argument.

After the prosecutor elicited lengthy hearsay testimony from its law enforcement witnesses, and improperly asked Ms. Weber and Detective Carlson to opine on the consistency of Ms. Trowbridge's statements, the trial court suggested adding the following language to the jury instructions, which comes from the Ninth Circuit model criminal instructions:

> The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

RP 361; CP 40; 9th Cir. Crim. Model Jury Inst. 1.7 (2017 ed.). The parties agreed. RP 362.

An unchallenged jury instruction becomes the "law of the case." *State v. France*, 180 Wn.2d 809, 816, 329 P.3d 864 (2014). The law of the case doctrine derives from common law and has "roots reaching back to the earliest days of statehood." *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting *State v. Hickman*, 135 Wn. App. 97, 101, 954 P.2d 900 (1998)). Although it can mean different things depending on the circumstances presented, the doctrine "refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal." *Johnson*, 188 Wn.2d at 755 (quoting *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)).

The court's instruction, which directed the jurors not to rely on the number of witnesses who testified to the same evidence, was agreed to by both parties and became the law of the case. App. at 7-8. The prosecutor misstated the law when he urged the jurors to convict Ms. Kleinsmith based on the fact that all of the State's witnesses testified to the same, consistent story provided by Ms. Trowbridge.

The prosecutor informed the jury:

> As I said before, Ms. Trowbridge talked to Ms. Weber. She told Ms. Weber what had just happened. She talked to Corporal Baxter, she talked to Detective Carlson, she talked to Officer Voss, and then she talked to Detective Carlson again and gave a recorded statement which was then transcribed. And then she testified in front of you under

> oath yesterday. And each and every time, she's consistent. The details are consistent.

RP 401.

The prosecutor's statements misstated the law because they urged the jury to give great weight to the number of times it heard Ms. Trowbridge's story from multiple witnesses, contrary to the court's instruction. When the prosecutor elicited this hearsay testimony from its law enforcement witnesses, and then told the jurors to rely on the number of times the story was told to convict Ms. Kleinsmith, he committed misconduct.

c. The State's errors could not have been cured with an instruction to the jury.

Even where a defendant does not object to the misconduct, reversal is required where "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). "Based on these principles, '[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.'" *Emery*, 174 Wn.2d at 762 (quoting *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). The relevant criterion is whether the defendant was prevented

from having a fair trial because the prosecutor "engendered or located in the minds of the jury" an incurable feeling of prejudice. *Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

The prosecutor's misconduct permeated Ms. Kleinsmith's trial. He deliberately elicited from each witness an account of the events as described by Ms. Trowbridge. After taking the personal observations of the only eyewitness, and recounting it for the jury five times, the prosecutor then asked two of the witnesses to opine on Ms. Trowbridge's credibility by testifying that Ms. Trowbridge's story was extremely consistent.

Possibly in an attempt to combat this miscarriage of justice, the trial court proposed adding language to the jury instructions that warned the jurors against relying on the number of times they heard certain evidence when determining how much weight to give it. Despite agreeing to this instruction, the State urged the jury to convict based on the number of times Ms. Trowbridge's story had been consistently told. In this way, the prosecutor's misconduct involved a multifaceted approach designed to influence the jury both through the repetition of Ms. Trowbridge's observations and the other witnesses' assessment of her credibility based on the consistency of the story she told. *See Glasmann*, 175 Wn.2d at 711.

The prosecutor focused his attention on the consistency of Ms. Trowbridge's story, and the number of witnesses who testified to it, because the evidence against Ms. Kleinsmith was otherwise weak. Ms. Trowbridge claimed her attention was drawn to the knife during the incident and that the knife was a butcher knife. RP 315-16. Yet she also claimed a "steak knife" found in Ms. Kleinsmith's kitchen sink next to a plate, and shown to her in a photograph a few weeks before trial, was the so-called butcher knife. RP 327. Ms. Trowbridge said the woman in the hallway was wearing a black t-shirt and shorts but Ms. Kleinsmith was later found wearing a long sleeve light grey shirt and sweatpants. RP 290, 326. The State offered no evidence of a motive and there was no evidence Ms. Trowbridge and Ms. Kleinsmith knew one another. In fact, Ms. Trowbridge believed Ms. Kleinsmith's apartment was vacant. RP 307.

By retelling the same story repeatedly to the jury, the details were distorted in the State's favor. For example, the State's final witness, Detective Carlson, combined Ms. Weber's statements and Ms. Trowbridge's statements when he testified "[Ms. Trowbridge] left her apartment and the door to 409 opened, who [sic] was occupied by a female that she had never met before," and then proceeded to describe how the woman in 409 was yelling and holding knife. RP 334. In fact, Ms.

Trowbridge did not know from which apartment Ms. Kleinsmith had appeared. *See* RP 254, 276, 309.

The prosecutor used this improper trial tactic, to recount Ms. Trowbridge's story over and over, to have other witnesses opine about her credibility, and to urge the jury to convict based on the number of times Ms. Trowbridge told a consistent story, to distract the jury from its lack of evidence. The effect of the prosecutor's misconduct was to incurably prejudice the jury. This Court should grant review.

2. This Court should grant review because the trial court violated Ms. Kleinsmith's right to a fair trial when it refused to instruct the jury on the essential elements of assault in the "to-convict" instruction.

a. <u>All elements of the crime must be included in the "to convict" instruction.</u>

All elements essential to a conviction must be included in the "to-convict" instruction. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). While the court need not incorporate all of the pertinent law into this one instruction, "an instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged." *Id*. (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). Where the instructions might permit the jurors to "assume that an essential element need not be proved," the defendant's right to a fair trial has been violated.

State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

Because "assault" is not defined by statute, courts have resorted to a common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995); *see also* RCW 9A.36.021. Here, the pertinent definition of second degree assault is "putting another in apprehension of harm." *Byrd*, 125 Wn.2d at 712. To be guilty of assault under this definition, the individual need not have intended to harm the complaining witness, but he must have intended to create a reasonable apprehension and imminent fear of bodily injury. *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), *overruled on other grounds by State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002); *Byrd*, 125 Wn.2d at 713, 887 P.2d 396.

Thus, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." *Byrd*, 125 Wn.2d at 713. Because the jury has the "right to regard the 'to-convict' instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction," this element must be included in the to-convict instruction. *Mills*, 154 Wn.2d at 8. On appeal, courts "may not rely on other instructions to supply the element missing from the 'to convict'

instruction." *Id*. at 7 (citing *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)).

b. The trial court erred when it refused to include the element of intent in the "to-convict" instruction**.**

Relying on the long-standing principle, Ms. Kleinsmith proposed a to-convict instruction that incorporated both the elements and relevant definition of assault in the second degree. RP 229; CP 22, 33-36. The instruction proposed by the defense stated that in order to convict Ms. Kleinsmith of second degree assault, the following elements must be proved beyond a reasonable doubt:

> 1) That on or about December 13, 2016, the defendant intentionally created apprehension and imminent fear of bodily injury in Sara Trowbridge with a deadly weapon;
>
> 2) That Sara Trowbridge was reasonable in her apprehension and imminent fear of bodily injury; and
>
> 3) That this act was made or received in the State of Washington.

CP 22.

The State objected to the proposed instruction, arguing the jury should be instructed only in the to-convict instruction as follows:

> (1) That on or about December 13, 2016, the defendant assaulted Sara Trowbridge with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.

RP 229; CP 49. The State proposed that instead of incorporating the elements into the to-convict instruction, the page breaks be removed so that language about the elements and definition of assault be provided to the jury on the same page as the to-convict instruction. RP 363; CP 49.

Following argument, the court proposed its own instruction. RP 374; CP 31. This instruction stated the elements of second degree assault as:

> (1) That on or about December 13, 2016, the defendant acted with the intent to create in another apprehension and fear of bodily injury with a deadly weapon; and
>
> (2) That the deadly weapon was a 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 injury; and
>
> (3) That the defendant's act with such deadly weapon in fact created in Sarah Trowbridge a reasonable apprehension and imminent fear of bodily injury even though the defendant did not actually intent to inflict bodily injury; and
>
> (4) That this act occurred in the State of Washington.

CP 31. Ms. Kleinsmith accepted the Court's proposal. RP 379.

Despite carefully crafting a to-convict instruction that incorporated the elements and relevant definition of second degree assault, the court ultimately ceded to the State's wishes and instructed the jury that in order

to find Ms. Kleinsmith guilty of assault, it must simply find she "assaulted" Sara Trowbridge in the State of Washington. RP 381; CP 49.

The trial court's ruling was made in error. Because the to-convict instruction "serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence," the trial court was required to incorporate the element of intent into the to-convict instruction. *Smith*, 131 Wn.2d at 263. The solution proposed by the State and adopted by the trial court, to include other instructions on the same page, did not remedy this error. *See* CP 49. This Court has "held on numerous occasions that jurors are not required to supply an omitted element by referring to other jury instructions." *Smith*, 131 Wn.2d at 262-63. Rather, an instruction purporting to list all of the elements of assault must do so. *See id.* at 263 (citing *Emmanuel*, 42 Wn.2d at 819-20). The to-convict instruction adopted by the court was constitutionally defective.

c. <u>This error was not harmless.</u>

"An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless." *Smith*, 131 Wn.2d at 263. The burden is on the State to show the error was harmless. *Id*. at 264.

The State cannot make that showing here. The evidence against Ms. Kleinsmith was weak. The only eyewitness to the event described a woman wearing different clothes than Ms. Kleinsmith and holding a knife

very different than the one found in Ms. Kleinsmith's apartment. RP 290, 326-37. Upon hearing Ms. Trowbridge's story, Ms. Weber concluded the woman holding the knife had come from Ms. Kleinsmith's apartment, but Ms. Trowbridge actually saw the woman with the knife in the hallway rather than in a specific apartment. RP 254, 276, 309. In addition, Ms. Trowbridge later claimed a "steak knife" was the butcher knife the woman was holding, despite testifying that her focus at the time of the event was primarily on the knife. RP 315-16, 327.

No evidence of a possible motive was offered by the State. It was unclear from the evidence at trial why the woman in the hallway was speaking to Ms. Trowbridge or would have moved toward her with a knife. The element of intent is an essential element of assault and the jury's consideration of that element was particularly important in Ms. Kleinsmith's case, where the State's evidence in support of this element was so limited.

The State's to-convict instruction, adopted by the court, provided the jurors with only a circular definition of assault. CP 49. This Court cannot assume the jurors looked elsewhere in the instructions to compensate for this error. *See Smith*, 131 Wn.2d at 265. This Court should grant review.

E. CONCLUSION

For all of the reasons stated above, this Court should grant review.

DATED this 13th day of December, 2018.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS, DIVISION ONE OPINION

November 13, 2018

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KAREN LYNN KLEINSMITH, Appellant.	)	No. 76632-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2018

ANDRUS, J. — A jury convicted Karen Lynn Kleinsmith of second degree assault with a deadly weapon after she chased her neighbor, Sara Trowbridge, down the hallway of their apartment building while holding a knife. Kleinsmith appeals, alleging that at trial, the prosecutor committed misconduct by asking the witnesses to opine as to Trowbridge's credibility. Kleinsmith also challenges a jury instruction, contending that it did not state all the elements of the crime. We affirm Kleinsmith's conviction.

FACTS

Kleinsmith and Trowbridge have varying accounts of what happened on December 13, 2016. It is undisputed that in December 2016, Kleinsmith and Trowbridge lived in adjacent apartments in the Ondine Apartments in Kirkland. Trowbridge testified that on December 13, 2016, as she walked past Kleinsmith's

Apartment 409, she heard a woman say "Get the fuck out." When Trowbridge turned around, she saw a woman holding a butcher knife. Trowbridge testified that the woman screamed "Don't come back" and began to chase her down the hallway. Trowbridge immediately fled to the building's front office and reported the event to Hannah Weber, an employee of Ondine, who called 9-1-1. Trowbridge described her alleged attacker as a blonde female wearing a black t-shirt and shorts, which was recorded by the 9-1-1 call.

Multiple officers responded to the call, including Corporal Kimberly Baxter, Officer Elizabeth Voss, and Detective Sean Carlson. Weber identified the resident of Apartment 409 as Kleinsmith and testified that Kleinsmith matched the physical description Trowbridge provided. Weber communicated this information to the officers who arrived on scene. The officers discovered that Kleinsmith had an outstanding arrest warrant from pending cases in Issaquah Municipal Court.[1] When the officers went to Apartment 409, they knocked loudly on the door, announced themselves repeatedly, and called several phone numbers associated with Kleinsmith, until the officers finally used a key given to them by Weber to enter the apartment.

When the officers entered Apartment 409, they heard a woman screaming inside, so they ordered her to walk toward the front door with her hands visible.

[1] Kleinsmith was charged with assault in the fourth degree, domestic violence, for allegedly attacking her elderly father with a kitchen knife, as well as a violation of a domestic violence no-contact order. Kleinsmith's father suffers from pre-dementia. While the court's findings of fact state that the charges are pending in Kirkland Municipal Court, the Prosecuting Attorney Case Summary states that the cases are pending in Issaquah Municipal Court.

Kleinsmith emerged from the back of the apartment and told the officers that she had been sleeping and did not know what was happening.

The police placed Kleinsmith in handcuffs and advised her of her Miranda[2] rights, at which point she invoked her right to have an attorney present for questioning. Though the police did not continue to question Kleinsmith after she invoked her rights, Kleinsmith did ask Detective Carlson to go back into her apartment to retrieve some clothing, and she later asked Corporal Baxter to retrieve her wallet and phone. She engaged in brief conversation with both as to where the items could be located and gave them permission to enter her apartment for that purpose. Detective Carlson noticed a large knife by the kitchen sink, and Corporal Baxter placed it into evidence.

As the police escorted Kleinsmith out of the building, Trowbridge identified Kleinsmith as her attacker, telling Detective Carlson she was "one hundred percent" sure that it was Kleinsmith.

At trial, the State called five witnesses: Weber, Corporal Baxter, Officer Voss, Detective Carlson, and Trowbridge. Although Trowbridge was the sole witness to the incident, each witness testified as to the events of that day. Kleinsmith did not testify. The prosecutor asked Weber whether Trowbridge's story to the officers on scene was consistent with what Trowbridge had told her immediately following the incident. The prosecutor also asked Detective Carlson whether Trowbridge's story changed between when the officers first arrived on

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

scene and her formal statement taken later that day. Both Weber and Carlson testified that Trowbridge's story remained consistent throughout.

A jury found Kleinsmith guilty of assault in the second degree. Kleinsmith was sentenced to four-and-a-half months in King County Jail, and six months in community custody, and ordered to have no contact with Trowbridge for 10 years. The court also ordered Kleinsmith to obtain mental health treatment.

ANALYSIS

A. Misconduct Related to the Witness's Credibility

Kleinsmith alleges that the prosecutor committed misconduct when he asked two of the witnesses to opine on Trowbridge's credibility. The misconduct, she contends, was prejudicial as Trowbridge was the only witness to, and alleged victim of, the incident with Kleinsmith. The State concedes that witness testimony regarding the consistency of Trowbridge's statements was erroneously admitted, but contends that it was not prejudicial.

Evidence that a witness repeatedly told the same story out of court is not admissible to corroborate or bolster the witness's testimony. State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992). Thus, the prosecutor improperly attempted to bolster Trowbridge's credibility when he asked Weber and the officers whether Trowbridge's story remained consistent at the scene and in court.

Kleinsmith, however, failed to object to the prosecutor's questions or to the witnesses' testimony at trial. An evidentiary error, such as the admissibility of testimony regarding Trowbridge's credibility, is not of constitutional magnitude. State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). And the failure to object

to impermissible statements by a prosecutor constitutes a waiver of the objection unless there is a substantial likelihood it affected the jury's verdict. State v. Gauthier, 189 Wn. App. 30, 37, 354 P.3d 900 (2015). When the defendant fails to object at trial, the defendant must also prove that the statements were so flagrant or ill-intentioned that the prejudice could not have been cured by a timely objection. Id. at 38.

Kleinsmith's defense at trial was that Trowbridge had misidentified her as the attacker. She asserts that the cumulative effect of four witnesses vouching for Trowbridge's credibility prejudiced the jury into believing Trowbridge's testimony that Kleinsmith was the woman who charged her with the knife. We disagree because there was ample evidence corroborating Trowbridge's testimony.

First, Kleinsmith matched the physical description of Trowbridge's attacker. Second, Weber testified that Trowbridge's only other neighbor, in Apartment 413, was a male resident and that there were no residents on Trowbridge's floor matching the physical description Trowbridge provided. Moreover, Trowbridge heard a woman scream "Get the fuck out," as she passed Kleinsmith's apartment. She subsequently identified Kleinsmith as her attacker as Kleinsmith was being escorted out of the apartment building by police, stating she was "one hundred percent" sure Kleinsmith was the woman wielding the knife.

Kleinsmith points to the fact that Trowbridge insisted the knife she saw was a butcher knife, while the knife found in Kleinsmith's kitchen was a steak knife. Kleinsmith also points out that the attacker's clothing as described by Trowbridge was different than the clothing Kleinsmith was wearing when arrested. She argues

that these inconsistencies raise serious questions as to the credibility of Trowbridge's overall story that Kleinsmith was her attacker. However, it is not implausible that Kleinsmith changed clothing during the half hour between the event and her encounter with the police. And the fact that no other resident on the floor other than Kleinsmith matched Trowbridge's description of her assailant, combined with the location of the altercation, is strong evidence that Kleinsmith was in fact her attacker.

Finally, Kleinsmith told police she had been sleeping in her apartment and had not heard the police, a fairly incredible story considering the duration of time the police stood outside her door attempting to get her attention. Corporal Baxter testified she knocked loudly and identified herself as the Kirkland Police repeatedly for 35 to 40 minutes.

We cannot say from this record that there is a substantial likelihood that the inadmissible credibility testimony changed the outcome of the trial.

Finally, Kleinsmith does not explain why a timely curative instruction would not have eliminated any resulting prejudice. Had counsel objected the first time the prosecutor asked a witness about the consistency of Trowbridge's statements, the objection would have been sustained and not asked again. Moreover, the jury could have been instructed to disregard any testimony regarding this issue. The questions were not so flagrant or ill-intentioned that a curative instruction would have been futile in remedying any prejudice.

B. Misconduct Related to the Law of the Case

Kleinsmith further contends that the prosecutor misstated the law of the case during closing argument. In his closing argument, the prosecutor said:

> As I said before, Ms. Trowbridge talked to Ms. Weber. She told Ms. Weber what had just happened. She talked to Corporal Baxter, she talked to Detective Carlson, she talked to Officer Voss, and then she talked to Detective Carlson again and gave a recorded statement which was then transcribed. And then she testified in front of you under oath yesterday. And each and every time, she's consistent. The details are consistent.

Kleinsmith alleges that referencing the consistency of Trowbridge's testimony during the closing argument was not only improper but misstated the law of the case as set out in Instruction No. 1. Kleinsmith did not object to these statements. On appeal, Kleinsmith alleges that the prosecutor essentially instructed the jury to give great weight to the number of times it heard Trowbridge's story from the five different witnesses.

Jury Instruction 1 said in part: "The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it." The State asserts that the instructional language on which Kleinsmith relies was merely a guide to the jury for how to evaluate evidence. The State, however, concedes that instructions to which the State does not object become "law of the case," State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), even if the instructions impose a burden not otherwise required. State v. Johnson, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). The State did not object to Instruction No. 1 proposed by the trial court. The court need not determine whether the language on which Kleinsmith

relies is a statement of law or merely a guide. The State essentially concedes the point.

Misstating bedrock legal principles on which our criminal justice system stands constitutes prosecutorial misconduct. State v. Venegas, 155 Wn. App. 507, 525, 228 P.3d 813 (2010) (misstating the law on presumption of innocence is flagrant misconduct warranting reversal). We do not find the prosecutor's closing argument to be a misstatement of basic criminal law that would render it misconduct. And as indicated above, even if it were misconduct, Kleinsmith has not established that the remark at trial was so flagrant and ill-intentioned that it could not have been cured with a jury instruction. We conclude the closing argument did not prejudice Kleinsmith's right to a fair trial.

C. Jury Instruction 8

Kleinsmith argues that Instruction 8, the "to-convict" instruction on the elements of assault did not instruct the jury on the element of intent. We reject this argument.

We review errors in jury instructions de novo. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). The to-convict instruction generally must contain all essential elements of the crime. State v. Mills, 154 Wn.2d 1, 7-8, 109 P.3d 415 (2005). In State v. Byrd, 125 Wn.2d 707, 715-16, 887 P.2d 396 (1995), the Supreme Court reversed an assault conviction on the ground that former WPIC 35.50, the definition of assault, relieved the State of the burden of proving an element of its case because the jury was not instructed that it had to find that the

defendant acted with the specific intent to cause apprehension or fear of bodily harm. The relevant paragraph of WPIC 35.50 at the time of Byrd's trial provided:

> An assault is also an intentional act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

This paragraph in WPIC 35.50 was deemed to be an erroneous statement of the law because it allowed a jury to find only that the defendant acted intentionally and the result of the act was the creation of a reasonable apprehension and fear of bodily injury, rather than the defendant acted with the intent to create this apprehension or fear. Byrd, 125 Wn.2d at 715.

The instruction in this case did not omit the specific intent element and is distinguishable from the instruction deemed improper in Byrd. Instruction 8 provided in its entirety:

> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 13, 2016, the defendant assaulted Sara Trowbridge with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.
>
> For purposes of this instruction:
>
> - *An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.*
> - A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

- 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.

(emphasis added).

Instruction 8 followed the Washington Pattern Jury Instructions (WPIC) for assault in the second degree, WPIC 35.19, the revised pattern jury instruction defining assault, WPIC 35.50, the pattern jury instruction defining intent, WPIC 10.01, and the pattern jury instruction defining "deadly weapon," WPIC 2.06.01. The third paragraph of WPIC 35.50 has been amended to include the specific intent element deemed missing by Byrd. Because Instruction 8 correctly instructed the jury to find that Kleinsmith acted with the specific intent to create apprehension and fear of bodily injury, there was no instructional error requiring reversal.

Affirmed.

Andrus, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76632-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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