Supreme Court No. 103167-0
(COA No. 86169-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN PATRICK KELLY,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW
(amended copy)

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A. IDENTITY OF PETITIONER AND DECISION BELOW

John Patrick Kelly, the petitioner here and appellant below, seeks review of the Court of Appeals opinion terminating review dated May 13, 2024, a copy of which is attached. RAP 13.3 and RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals ruled Mr. Kelly's conviction for second-degree assault against Jessica Cope may rest on his intent to put her husband in fear of harm. But to prove second-degree assault, the government must prove the defendant specifically intended to injure or scare a specific person, as this Court ruled in *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995). The Court of Appeals decision removes the government's obligation to prove the element of intent beyond a reasonable doubt as required by the Due Process Clause. This Court should accept review to

address the application of transferred intent to second-degree assault based solely on a third person's fear of injury. RAP 13.4(b)(1), (3).

2. The government protects all person's rights, including those of a defendant. When the government betrays this obligation, it commits misconduct. Here, the government committed misconduct when it improperly elicited testimony that was prohibited through a pre-trial order, attempted to shift the burden in closing arguments, and denigrated counsel through audible sighs during portions of the trial. In conflict with opinions of this Court, the Court of Appeals erroneously upheld Mr. Kelly's convictions secured in violation of his constitutional right to a fair trial. This Court should accept review. RAP 13.4(b)(1), (3).

3. While RCW 9.94A.533 requires firearm enhancements to be run consecutive to each other, it is

silent regarding whether firearm enhancements may be run concurrently as an exceptional sentence. The trial court recognized Mr. Kelly's remorse and successful efforts to rehabilitate himself but reluctantly imposed two concurrent 36-month enhancements because it believed it did not have the authority to impose an exceptional sentence. This Court should accept review to revisit its decision in *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999), which incorrectly and harmfully holds that sentencing courts lack discretion to impose an exceptional sentence with regard to firearm enhancements. RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

John Kelly was experiencing paranoid delusions and feared people inside his home wanted to kill him. RP 265, 287. He called emergency services so often

they were no longer responding to his calls. RP 284. He painted "Call 911" on his windows. RP 303, 349.

Mr. Kelly saw Alexander Cope walk past his second-story window with his wife Jessica and their three children. RP 368. Mr. Kelly leaned out and asked Mr. Cope to call 911. RP 266, 364. Mr. Kelly had a gun in his hand, but did not use it. RP 364.

Mr. Cope quickly walked away and called 911, reporting Mr. Kelly threatened him. RP 368. The family went home. RP 368.

The government charged Mr. Kelly with five first-degree assault charges, each with an individual firearm enhancement. CP 3. The court dismissed two counts of assault related to the youngest children. RP 551.

Before trial, the court granted Mr. Kelly's motion to exclude testimony from the Cope family that he was

a "bad guy." CP 11–12; RP 227. But during Ms. Cope's testimony, she discussed her son's concerns that Mr. Kelly was a "bad guy." RP 452. Mr. Kelly's immediate objection was sustained. RP 452-53.

On several occasions, the prosecutor audibly sighed after Mr. Kelly objected. RP 414; 9/9/22 RP 11.. The court admonished her and she apologized. RP 414.

Over Mr. Kelly's objection, the court gave the prosecutor's requested instruction on transferred intent. RP 543.

In closing arguments, defense spoke about how Mr. Kelly's drug use had caused him to be paranoid and delusional. RP 599. Mr. Kelly argued that he did not intend to commit the assaults. RP 605. The prosecution responded by claiming Mr. Kelly had not proven drugs caused his paranoia. RP 607. The court sustained Mr. Kelly's objection. *Id.*

After closing arguments, Mr. Kelly made a motion to dismiss based on government misconduct. RP 620. The court denied this motion. RP 624.

The jury found Mr. Kelly guilty of two counts of second-degree assault against Mr. Cope and Ms. Cope. RP 631. It also found him guilty of one count of unlawful display of a weapon involving the Cope's oldest son. RP 631.

Before sentencing, Mr. Kelly moved for a new trial based on the prosecutor's misconduct. CP 106. He explained the prosecutor's audible sighs had also impacted the jury. CP 111. The court recognized this improper conduct but denied the motion. 10/9/22 RP 11.

Mr. Kelly had no criminal history other than misdemeanor offenses. RP 120. At sentencing, the court was frustrated by its perceived lack of discretion

where it observed Mr. Kelly's clear remorse, effort to better himself, and resulting improvement in his life circumstances. 9/9/22 RP 35. The court imposed 12 months for the underlying charges. CP 128; 9/9/22 RP 33–34. Believing it was constrained by statute, it also ordered two 36-month firearm enhancements to run consecutively for a total sentence of seven years. CP 128; 9/9/22 RP 33–34.

D. ARGUMENT

1. Contrary to the Court of Appeals decision, transferred intent does not extend to fearful onlookers where no one is injured.

In *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009), this Court held transferred intent is available to convict a person of first-degree assault based on the plain language of the statute. But the second-degree assault statute is critically different. It demands a

specific intent to assault a specific person. The Court of Appeals misunderstood this distinction.

As the dissent warned in *Elmi*, "the doctrine of transferred intent, whether at common law or as codified, is not and never has been intended to apply in circumstances where no unintended victim is injured." 166 Wn.2d at 222 (Madsen, J., dissenting). Here, no *unintended* victim was injured. Worse, not even the alleged *intended* victim was injured. This broad application of transferred intent is not supported by this Court's decisions, is wholly unimagined by the common law, and runs afoul of due process.

a. The doctrine of transferred intent does not apply to second-degree assault where the accused neither intended to cause injury nor caused injury.

The common law doctrine of transferred intent was developed for the scenario where a person intends to injure one person but instead injures someone else

nearby. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). It provides a mechanism to find a defendant who shoots at A but misses and hits B instead "just as guilty as if his aim had been accurate." 1 Wayne R. LeFave, *Subst. Crim. L.* § 6.4(d) (3d ed.) (2023).

But this Court did not rely on the common law doctrine in *Wilson* to explain the basis of the transferred intent doctrine. Instead, it relied on the plain language of the first-degree assault statute. Under RCW 9A.36.011, once Wilson formed the "intent to inflict great bodily harm," that intent transferred to any unintended victim. *Wilson*, 125 Wn.2d at 218.

Again in *Elmi*, this Court relied on statutory construction to explain the transferred intent doctrine. 166 Wn.2d at 218. Mr. Elmi fired shots into a home, intending to inflict great bodily harm upon his

estranged wife. *Id.* at 218–19. Relying on the first-degree assault's particular statutory language, this Court concluded that the person assaulted does not have to be the same person who the defendant intended to inflict great bodily harm upon. *Id.*

But this same statutory language does not exist for the second-degree assault statute. And the common law notion to transferred intent should not apply to this situation. This issue has not been resolved by this Court and review should be granted.

b. The transferred intent doctrine impermissibly dilutes the prosecution's burden of proof.

Washington recognizes three common law definitions of "assault": "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting

another in apprehension of harm." *Elmi*, 166 Wn.2d at 215.

This case involves only the third definition of assault. The government alleged, solely, that Mr. Kelly placed the Copes in apprehension of harm. RP 245.

As this Court has held, "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.

The transferred intent doctrine relieves the government of the burden of having to prove that the defendant intended to injure the victim. *State v. Salamanca*, 69 Wn. App. 817, 825–27, 851 P.2d 1242 (1993). This doctrine is controversial, as it provides the government with a "free ride by relieving it of its constitutional burden of proving the accused's guilt on every element of the offense beyond a reasonable

doubt." John P. Einwechter, *New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice*, 1998 Army Law. 20, 23.

The statutory scheme shows the legislature exclusively codified transferred intent into the first-degree assault statute, not lesser degrees of assault. RCW ch. 9A.36 criminalizes assault based on acts of physical harm and adjusts culpability according to the severity of the harm and mental state. The scheme imposes increased punishment commensurate with mental culpability.

The Court of Appeals impermissibly extended the common law concept of transferred intent to impose multiple punishments where no unintended victim was injured. It ignored the legislature's intent to limit transferred intent to acts of first-degree assault. It also exceeds the scope of common law transferred intent

doctrine. Instead, it relies instead on other Court of Appeals cases that are wrongly decided, and if not, are readily and consequentially distinguishable.

c. The common law doctrine of transferred intent does not allow the government to prove second-degree assault against unintended, unharmed onlookers.

Even if the common law doctrine of transferred intent applies to some second-degree assault scenarios, it cannot apply here. At common law, the doctrine of transferred intent provided a mechanism to hold accountable a defendant with bad aim, who intends to injure person A but instead, or also, injures person B. 1 Wayne R. LeFave, *Subst. Crim. L.* § 6.4(d) (3d ed.) (2023). The doctrine was not intended to "impose multiple punishments where no unintended victim received injury." *Elmi*, 166 Wn.2d at 222 (Madsen J., dissenting).

The doctrine does not permit the government to secure assault convictions for passersby who grow afraid when they see a person who appears dangerous. Assuming Mr. Kelly's conversation with Mr. Cope was the result of an intent to place Mr. Cope in reasonable apprehension of fear, this does not make Mr. Cope liable for others who were present.

Taken to this extreme, the doctrine relieves the government of its burden of proof to an intolerable degree. No published opinion from the Court of Appeals or this Court sanctions a prosecution such as this one. Review should be granted to clarify the constitutional scope of transferred intent.

The Court of Appeals relied on transferred intent cases where someone was actually injured. App. at 7;l see, e.g., *State v. Aguilar*, 176 Wn. App. 264, 308 P.3d 778 (2013) (defendant unintentionally cut daughter

while intentionally assaulting wife); *State v. Frasquillo*, 161 Wn. App. 907, 255 P.3d 813 (2011) (gunshots fired into home threatened injury and caused fear in people present)[1]; *State v. Wilson*, 113 Wn. App. 122, 52 P.3d 545 (2002) (intentional shooting strikes unintended victim); *State v. Clinton*, 25 Wn. App. 400, 606 P.2d 1240 (1980) (intentional assault with pipe also strikes second person).

The Court of Appeals incorrectly relied on cases where the defendant specifically intended to physically injure a certain person to broadly apply the doctrine of transferred intent here, where there was no evidence Mr. Kelly intended to do more than place one person, Mr. Cope, in fear. In the cases the Court of Appeals

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[1] In dicta, *Frasquillo* wrongly asserted *Elmi* controls transferred intent as applied to second-degree assault. But the second-degree assault statute does not contain the same language, so this is plainly incorrect.

cited, at least one individual was in fact injured. Neither the intent to injure, nor actual physical injury, exist here.

In *State v. Abuan*, 161 Wn. App. 135, 158, 257 P.3d 1 (2011), the Court of Appeals warned against extending *Elmi* or common law transferred intent to turn "anyone in the neighborhood who heard the gunshots" into the victim of assault. The result is more extreme here where no gun was fired.

As this Court ruled in *Byrd*, "specific intent either to create an apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." 125 Wn.2d at 713. The Court of Appeals decision is contrary to *Byrd*.

d. In the absence of transferred intent, there is insufficient evidence to support Mr. Kelly's conviction for second degree assault against Ms. Cope.

There is no evidence Mr. Kelly registered the presence of Ms. Cope, let alone intended to assault her. In the absence of transferred intent, Mr. Kelly's conviction is not supported by substantial evidence.

The entire encounter took about ten seconds. RP 367. RP 368. As the Copes testified, Mr. Kelly made a desperate plea to Mr. Cope for help, exhorting him to call 911. RP 366. Mr. Kelly believed there were people in his house he thought were trying to kill him. RP 375.

Ms. Cope said she feared that Mr. Kelly would "discharge" the weapon in his hand, not that he would "shoot" her. RP 446. Mr. Kelly never discharged his firearm or even directly pointed it. The Copes quickly left. RP 370.

Where there is insufficient evidence of an element of a crime, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Yet, in the absence of evidence Mr. Kelly intended to assault Ms. Cope, the Court of Appeals affirmed.

All of Mr. Kelly's acts were directed at Mr. Cope. Only by relying on the transferred intent doctrine could the government establish sufficient evidence to support an assault on Ms. Cope. The Court of Appeals erred when it approved of such a broad application of transferred intent to uphold this conviction. *State v. Hummel*, 196 Wn. App. 329, 332, 383 P.3d 592 (2016).

This Court should accept review to reject the Court of Appeals' application of transferred intent. Instead, the government failed to prove Mr. Kelly intended to assault Ms. Cope, as required by RCW 9A.36.021(1)(c).

2. Prosecutorial misconduct deprived Mr. Kelly a fair trial by eliciting excluded testimony, improper burden shifting in closing, and denigrating defense counsel by audibly sighing.

The Court of Appeals acknowledged the prosecutor elicited testimony that was explicitly excluded by court order. App. at 12. It acknowledged the prosecutor engaged in improper burden shifting in closing arguments. App. at 13. And it acknowledged the prosecutor denigrated the defense by audibly sighing throughout the proceedings. App. at 15. Nevertheless, the Court of Appeals failed to rectify the incurable and clear prejudice that resulted.

The Sixth and Fourteenth Amendments and article I, section 22 protect the right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citations omitted). Prosecutorial misconduct deprives a person accused of a crime of

their constitutional right to a fair trial. *Id.* at 703–04 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)).

a. The prosecutor elicited improper testimony designed to create an emotional response.

Before trial, Mr. Kelly asked the court to exclude testimony from the Cope family that Mr. Kelly was a "bad guy." CP 8. The court agreed and ordered that no such testimony should be elicited. RP 225. However, when Ms. Cope testified, she used this exact phrase to describe her conversation with her son. RP 452. Mr. Kelly immediately objected to this phrase, which the court sustained. RP 453.

Acts taken in defiance of a direct court order may constitute misconduct. *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (reversing for prosecutorial misconduct where prosecutor argued facts not in evidence "in spite of a direct court order on a motion in

limine to exclude" the evidence at issue). Where a prosecutor references inadmissible evidence, such actions are flagrant, ill-intentioned, and constitute misconduct. *State v. Alexander*, 64 Wn. App. 147, 155–56, 822 P.2d 1250 (1992).

This Court knows, seasoned prosecutors understand how to draw lines and when to go over them. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). Here, the prosecutor knew the impact of Ms. Cole's son describing Mr. Kelly as a "bad guy" would have on the jury. Taking the risk of committing misconduct was improper and deprived Mr. Kelly of his right to a fair trial.

b. The prosecutor attempted to shift the burden of proof.

In her rebuttal argument, the prosecutor attempted to shift the burden of proof. She argued that Mr. Kelly had presented no expert testimony about drug use to support his theory that he could not form the intent to commit the charged crimes. RP 607. Mr. Kelly immediately objected to this argument, which the court sustained. *Id*.

The government bears the burden to prove a criminal case beyond a reasonable doubt and may not shift the burden of proof to the defense. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A person accused of a crime is not required to present any evidence at trial. *State v. Osman*, 192 Wn. App. 355, 366, 366 P.3d 956 (2016).

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's

guilt beyond a reasonable doubt constitute misconduct." *Lindsay*, 180 Wn.2d at 434. A prosecutor's argument is improper if it discusses the reasonable doubt standard in a way that "trivialize[s] and ultimately fail[s] to convey the gravity of the State's burden and the jury's role in assessing the State's case." *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)).

By arguing Mr. Kelly had to present expert testimony to prove he did not have intent, even with the objection sustained, the government could then argue that its lack of evidence was not fatal to its case. *Allen*, 182 Wn.2d at 369..

"The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." *See Davenport*,

100 Wn.2d at 764 (overruling timely and specific objection lends "an aura of legitimacy to what was otherwise improper argument"). This is because "[t]he jury knows that the prosecutor is an officer of the State." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). "It is, therefore, particularly grievous that this officer would so mislead the jury" regarding a critical issue in the case. *Id*.

Despite acknowledging this argument was an improper attempt to shift the burden of proof, the Court of Appeals failed to appreciate the substantial likelihood it affected the verdict. App. at 14. As in *Allen*, the misconduct was especially acute because the government's misstatement of the law was directly tied to the central issue of the case: intent. Where the government did not have evidence that Mr. Kelly intended to assault Ms. Cope or any of the children, the

prejudicial effect of shifting the burden of proof as to intent could not be cured by simply instructing the jury to ignore the prosecutor's statement. The Court of Appeals was plainly wrong.

c. The prosecutor's sighs denigrated the dignity of defense counsel.

Throughout the trial, the prosecutor audibly sighed when Mr. Kelly's attorney made legal arguments. They got bad enough that the court had to warn her to stop making the noises. RP 414. The prosecutor blamed her conduct on Mr. Kelly's lawyer, who she claimed knew better than to make the arguments he was making. *Id*. She was admonished and ultimately, she apologized. *Id*.

After the trial, Mr. Kelly's attorney spoke with the jurors, who told him they were disturbed by the prosecutor's behavior. 9/9/22 RP 9. The court recognized the behavior occurred on several occasions.

9/9/22 RP 11. Nonetheless, the court denied Mr. Kelly's motion for a new trial. 9/9/22 RP 14.

A prosecutor may not impugn defense counsel. *Lindsay*, 180 Wn.2d at 431 (citing *Warren*, 165 Wn.2d at 29–30). A prosecutor's actions that malign defense counsel can severely damage an accused's opportunity to present their case and are therefore impermissible misconduct. *Id.* at 432.

Like *Lindsay*, the prosecutor's actions may be based on past interactions with Mr. Kelly's attorney. *See* RP 414. Her frustrations, however, are not excusable when they manifest themselves in front of the jury, which the court recognized, calling it "tension." 9/9/22 RP 11. Mr. Kelly's attorney recounted how the prosecutor was "shaking her head staring me down" during a cross-examination. CP 112. It got bad enough that the court called out the prosecutor. RP

413. And while the prosecutor apologized for her unprofessional behavior, this did not reduce the harm caused to Mr. Kelly. RP 414.

The Court of Appeals recognized the impropriety of the prosecutor's conduct, but misunderstood its affect. App. at 16. In fact, it held there was no prejudicial effect because the audible sighs, "occurred outside the presence of the jury[.]" *Id.* As described above, this is inaccurate. The jury clearly observed the prosecutor, an officer of the State, denigrate Mr. Kelly's defense. This misconduct permeated Mr. Kelly's trial and prevented him from receiving a fair trial.

d. This Court should review the prosecutor's misconduct that deprived Mr. Kelly of his right to a fair trial.

When a prosecutor commits misconduct, this Court examines whether the conduct prejudiced the defendant. *Allen*, 182 Wn.2d at 375.

The government had no direct evidence Mr. Kelly intended to assault any of the Cope family except possibly Mr. Cope. Even with Mr. Cope, there were questions about Mr. Kelly's ability to form intent. Mr. Kelly was clearly in distress and believed that the only way to save himself was by getting someone else to call 911. Whether he intended to commit an assault was clearly questionable because of his delusional state at the time of the offense.

The prosecutor's misconduct deprived the jury of its ability to see the evidence other than through the prosecutor's disregard for defense counsel. Prosecutors hold great sway over jurors and must act with great care when presenting their cases. The prosecutor took no such care in this case.

Because the Court of Appeals failed to identify the clear effect of prosecutorial misconduct on the

verdict in this case, despite guidance from this Court in cases like *Emery*, *Lindsay*, *Warren* and others, this Court should accept review.

3. This Court should grant review to overrule its 5–4 decision in *Brown* and should clarify that a sentencing court may impose concurrent sentencing enhancements for the same conduct.

Where, as here, the government relies on proof of one crime to prove another, the trial court can run sentencing enhancements concurrently. The Court of Appeals, like the sentencing court below, did not know it had the discretion to run Mr. Kelly's enhancement concurrently as an exceptional sentence. To the extent *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999) precludes the court from exercising this discretion, it should be overruled.

Here, the court was clearly frustrated by its perceived lack of discretion. The court stated, "Mr.

Kelly has expressed remorse, and it's clear that you've taken steps to better yourself and that your life is in a better place than it was when this incident took place." 9/9/22 RP 33. But the court believed the legislature removed the court's discretion to consider alternative sentencing for the enhancements. 9/9/22 RP 33–34.

RCW 9.94A.533 provides that firearm enhancements shall run consecutively to each other. But the statute does not prevent a court from modifying the length of time imposed for a firearm enhancement under the exceptional sentence provisions of RCW 9.94A.535. This makes it different from the restrictive language used by the legislature in RCW 9.94A.540(1), which instructs that mandatory minimum terms for certain offenses "shall not be varied or modified under RCW 9.94A.535." RCW

9.94A.540(1). The Court of Appeals decision ignores this key distinction.

The lack of this similar language in the firearm enhancement provisions indicates the length of enhancements can be modified under the exceptional sentence provisions. *See State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015) ("the legislature's choice of different language indicates a different legislative intent"). Indeed, this different language creates ambiguity on whether concurrent sentences are permitted. *State v. McFarland*, 189 Wn.2d 47, 54, 399 P.3d 1106 (2017). And even if there are other reasonable interpretations, the rule of lenity requires that the most favorable interpretation to the defendant be applied, meaning that concurrent sentences are allowed. *Conover*, 183 Wn.2d at 711–12; *see McFarland*, 189 Wn.2d at 55.

Justice Madsen's concurring opinion in *Houston-Sconiers* supports the finding that courts have the discretion to run firearm enhancements concurrently. *State v. Houston-Sconiers*, 188 Wn.2d 1, 12–13, 391 P.3d 409 (2017). In *Houston-Sconiers*, this Court overruled *Brown* as it relates to juvenile sentences. *Id.* at 21 & n.5. It reasoned that in light of Eighth Amendment jurisprudence, the statutes must be read to allow trial courts discretion to impose mitigated downward sentences for juveniles. *Id.* at 21, 24–26.

A concurring opinion explained that because the legislature did not expressly forbid exceptional sentences downward for firearm enhancements but forbade exceptional sentences in other circumstances, exceptional sentences for firearm enhancements are proper. *Houston-Sconiers*, 188 Wn.2d at 36 (Madsen, J., concurring). The language of RCW 9.94A.533 also does

not mandate a contrary result because it "does not exclude the enhanced sentences from modification under the exceptional sentence provision." *Id.* at 37.

In sum, it is improper to read additional prohibitions into RCW 9.94A.533(3)(e). The legislature was silent about whether the length of firearm enhancements could be modified as part of an exceptional sentence. *Id.* As RCW 9.94A.540(1) shows, the legislature knows how to prohibit this but did not. Accordingly, RCW 9.94A.533(3)(e) should not be read to deprive sentencing courts of their discretion to impose exceptional sentences when there are firearm enhancements.

"Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." *McFarland*, 189 Wn.2d at 57. But mandatory consecutive sentences for

firearm enhancements has "robbed judges of the discretion that the legislature, through the SRA, expressly gives them in order to fulfill the purposes of the act." *Houston-Sconiers*, 188 Wn.2d at 39 (Madsen, J., concurring). This creates firearm sentences that "may be as long as or even vastly exceed the portion imposed for the substantive crimes." *Id.* at 25. This is a "travesty." *Id.* at 40 (Madsen, J., concurring).

This Court "will overrule prior precedent when there has been a clear showing that an established rule is incorrect and harmful or when the legal underpinnings of our precedent have changed or disappeared altogether." *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (cleaned up). *Brown* should be overruled because it is wrong and demonstrable harmful, as this case and others prove.

Brown also failed to consider the constitutional-doubt canon of construction. Statutes must be interpreted to avoid constitutional doubts or problems. *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); *Houston-Sconiers*, 188 Wn.2d at 24; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247–51 (2012).

Unless the firearm enhancements provisions are subject to modification through an exceptional sentence, unconstitutional cruel punishment is the sure result. The state and federal constitutions forbid cruel punishment. U.S. Const. amend. VIII; Const. art. I, § 14. Washington's constitutional provision has frequently been independently interpreted to provide greater protection than its federal analog. *In re Pers.*

Restraint of Monschke, 197 Wn.2d 305, 311–13 & n.6, 482 P.3d 276 (2021); *State v. Gregory*, 192 Wn.2d 1, 15, 427 P.3d 621 (2018). Absent express language stating that firearm enhancements are not subject to modification or departure through an exceptional sentence, firearm enhancements remain subject to such modification or departure.

This is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). As is evident here, lengthy consecutive sentences for firearm enhancements create disproportionate and draconian sentences. Without the escape valve of an exceptional sentence, people like Mr. Kelly receive unconstitutionally cruel sentences. For these reasons, review should be granted.

E. CONCLUSION

For the foregoing reasons, this Court should accept review under RAP 13.4(b)(1), (3), and (4).

This petition is 4813 words long and complies with RAP 18.7.

DATED this 24th day of June 2024.

Respectfully submitted,

WILLA D. OSBORN (WSBA 58879)
Washington Appellate Project (91052)

APPENDIX

FILED
5/13/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN PATRICK KELLY, Appellant.	No. 86169-7-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — We are asked in this appeal to decide (among other issues) whether the common law doctrine of transferred intent applies in cases, like this one, where the defendant is charged with second degree assault. John Patrick Kelly pointed a loaded handgun at Alexander and Jessica Cope and their three children and yelled "Call 911 or I'll shoot you" as they walked past his residence. Although Kelly told police after the incident that he saw only Mr. Cope and not Ms. Cope when he yelled "I'll shoot you," he was convicted and sentenced for second degree assault against Ms. Cope in addition to second degree assault against Mr. Cope and the lesser included offense of unlawful display of a weapon against the eldest Cope child. The trial court sentenced Kelly within the standard range on each count and imposed two 36-month firearm enhancements to run consecutively for a total sentence of 7 years of confinement. On appeal, Kelly argues (a) in the absence of transferred intent, which he claims is inapplicable here, there is

insufficient evidence to sustain the conviction on second degree assault against Ms. Cope, (b) his convictions also should be reversed because of prosecutorial misconduct, and (c) the trial court erred in running the firearm enhancements consecutively. We affirm.

I

Alexander Cope, Jessica Cope, and their three minor children were walking through their neighborhood when they heard a banging sound from a nearby house. Mr. and Ms. Cope looked toward the house and saw Kelly leaning out of a second-story story window waving a silver object. Kelly yelled at the Copes, "Does this look like a fake to you?" Mr. Cope realized the object in Kelly's hand was a handgun and replied, "What are you talking about?" Kelly then pointed the handgun at the Cope family and said, "Call 911. Somebody is out to get me. Call 911 or I'll shoot you." At this point, Ms. Cope also realized the object was a handgun. Mr. and Ms. Cope were standing one to two feet away from each other when Kelly pointed the gun at them. Recognizing Kelly's statements as a threat and fearing that Kelly would shoot them and their children, Mr. and Ms. Cope quickly walked their children around the corner out of Kelly's view and reported the incident to law enforcement.

When police arrived at Kelly's residence, Kelly initially refused to engage with them because he believed they were not real law enforcement officers. When Kelly eventually talked to the officers, he said a man named Nick had been trying to kill him as part of a conspiracy. Over the previous two days, Kelly had called 911 several times to report his concerns to law enforcement, but Kelly believed that Nick had rerouted these phone calls to fake law enforcement officers. Kelly

had also spray painted "Call 911" on his window. When police asked him if he had interacted with anyone outside of his residence, Kelly said he tried to wave down a man walking by his house to call 911 but became upset when the man refused. Kelly denied pointing a firearm at the man or seeing a family walking with him. Officers believed Kelly's paranoid and erratic behavior was caused by his admitted methamphetamine use over the past several days. Upon searching the upstairs bedroom, officers discovered a loaded silver semi-automatic handgun with a round in the chamber and the safety off.

The State initially charged Kelly with five counts of first degree assault, but it reduced the charges before trial to second degree assault, each with an individual firearm enhancement. After the State rested at trial, the court dismissed two of the assault charges relating to the youngest Cope children for insufficient evidence because "they were too young to know what was happening." The jury convicted Kelly on the remaining charges of (1) second degree assault against Mr. Cope, (2) second degree assault against Ms. Cope, and (3) the lesser included offense of unlawful display of a weapon against the eldest Cope child. The jury also found by special verdict that Kelly was armed with a firearm during the commission of the crimes. The trial court sentenced Kelly to 12 months of confinement on the underlying charges and imposed two 36-month firearm enhancements to run consecutively for a total sentence of 7 years of confinement. Kelly appeals.

II

A. Sufficiency of the evidence

Kelly asserts that the State "presented insufficient evidence to sustain a

conviction" of second degree assault against Ms. Cope. We disagree.

Kelly's argument is premised on the trial court's to-convict instruction, which he correctly argues is controlling under the law of the case doctrine. While the law of the case doctrine "means different things in different circumstances," here it is used to refer "to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal." *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *Id.* at 756 (citing *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). This legal principal is the central thrust of Kelly's argument.

The to-convict instruction at issue here (instruction 14) states:

> To convict the defendant of the crime of assault in the second degree, as charged in count two, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about 20th day of May, 2020, the defendant assaulted Jessica Cope 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 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.

Thus, to convict Kelly of second degree assault against Ms. Cope, the State was required to prove beyond a reasonable doubt that (1) Kelly "assaulted Jessica Cope," (2) he used a "deadly weapon," and (3) this act occurred in Washington.

When analyzing whether evidence is sufficient to uphold a jury's verdict, this court applies a deferential standard of review. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). "Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). Additionally, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Johnson*, 188 Wn.2d at 762 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We also defer to the jury on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

Here, sufficient evidence shows that Kelly used a deadly weapon and that the assault took place in Washington. As noted previously, the evidence shows that Kelly pointed a loaded handgun at Mr. and Ms. Cope and their children and yelled "Call 911 or I'll shoot you" as they walked past his residence. Kelly does not contest, nor could he, that a loaded handgun is a deadly weapon. *See* instruction 10 ("A firearm, whether loaded or unloaded, is a deadly weapon."). The evidence also shows that the assault occurred in University Place, which is located in Washington. Thus, the first two elements of second degree assault against Ms. Cope are supported by sufficient evidence.

Sufficient evidence also supports the remaining element, which is that Kelly "assaulted Jessica Cope." Instruction 11 defines "assault" as follows:

> An assault is . . . an act done with the intent to create in

> another apprehension of 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.

Instruction 11 requires intent, which is defined in two other jury instructions. First, instruction 9 states:

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Second, instruction 12 states:

> If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault any third person who is put in reasonable apprehension and imminent fear of bodily injury.

Under these instructions, intent can be established by showing *either* (1) that Kelly intended to assault Ms. Cope (direct intent under instruction 9) *or* (2) that he intended to assault Mr. Cope and that Ms. Cope was put in reasonable apprehension and imminent fear of bodily injury (transferred intent under instruction 12).

Sufficient evidence supports a finding of transferred intent under Instruction 12. Kelly does not dispute that he acted with intent to assault Mr. Cope.[1] Under instruction 12, this intent transfers to Ms. Cope if she was put in reasonable apprehension and imminent fear of bodily injury. Addressing that issue, Ms. Cope testified that Kelly pointed the silver object in his hand "directly at us" and "[t]owards us. We were -- the wagon and the kids were next to me and next to my husband. We were all still standing together." When Kelly then said, "Call 911 or I'll shoot you," it became clear to Ms. Cope that the object "was indeed a firearm." Ms. Cope

[1] This concession is well taken because Mr. Cope testified he "believed we were going to be shot at" after Kelly pointed the handgun at him and his family and yelled "Call 911 or I'll shoot you."

quickly removed herself and her children from the line of fire because "I didn't want to be in any kind of vicinity to somebody waving a firearm in our direction. I was worried that it could be discharged." Viewed in the light most favorable to the State with all reasonable inferences drawn in the State's favor, there is sufficient evidence to establish transferred intent under instruction 12.

At oral argument, as well as in prior briefing, Kelly did not seriously dispute that there is sufficient evidence to find transferred intent under instruction 12. Instead, Kelly argues that the transferred intent doctrine does not apply to the second degree assault conviction at issue here. Stated another way, Kelly claims we should examine the sufficiency of the evidence *in the absence of* transferred intent and instruction 12. But contrary to Kelly's argument, Washington courts have recognized for decades that the transferred intent doctrine may apply in second degree assault cases. *See, e.g., State v. Aguilar*, 176 Wn. App. 264, 275, 308 P.3d 778 (2013) ("[T]ransferred intent is applicable to second degree assault charges involving an accidental or unintended victim.") (quoting *State v. Wilson*, 113 Wn. App. 122, 131, 52 P.3d 545 (2002)); *State v. Clinton*, 25 Wn. App. 400, 401, 606 P.2d 1240 (1980) (a "classic 'transferred intent' case" involving second degree assault where the defendant swung a pipe at one person but it slipped from his hand and struck another).

Nor are we persuaded by Kelly that the Washington legislature somehow abrogated the transferred intent doctrine in second degree assault cases when it codified the transferred intent doctrine in the first degree assault statute, RCW 9A.36.011, but *not* in the second degree assault statute, RCW 9A.36.021. In support of this argument, Kelly relies on *State v. Elmi*, 166 Wn.2d 209, 215, 207

P.3d 439 (2009), which involved a defendant who fired gunshots into a living room occupied by the targeted victim and four other children. 166 Wn.2d at 212-14. The Supreme Court affirmed Elmi's convictions for first degree assault against the four unintended victims under a strict reading of RCW 9A.36.011, which provides, "A person is guilty of assault in the first degree if he or she, with *intent to inflict* great bodily harm: . . . [a]ssaults *another* with a firearm . . . ." *Id.* at 218. Because the court determined that the first degree assault statute "encompasses transferred intent" by "provid[ing] that once the mens rea is established, any unintended victim is assaulted if they fall within the terms and conditions of the statute," the court did not resort to applying the common law transferred intent doctrine. *Id.*

In relying on *Elmi*, Kelly inverts the court's reasoning and erroneously concludes, without supporting authority, that "[b]ecause the legislature did not codify transferred intent, it could not be relied on to prove second-degree assault." Reply Br. 5.[2] But nowhere does *Elmi* state that the legislature abrogated the common law doctrine of transferred intent with respect to second degree assault by only codifying the doctrine into the first degree assault statute. To the contrary, *Elmi* implicitly rejected this argument by noting that the common law doctrine of transferred intent "is generally applied only when a criminal statute matches specific intent with a specific victim." *Elmi*, 166 Wn.2d at 217 (citing *State v.*

[2] This logical fallacy is referred to as "denying the antecedent," which former Justice Wiggins of our Supreme Court has explained as follows: "Under the rules of formal logic, conditional statements take the form, 'If P, then Q.' P is termed the antecedent and Q the consequent. The fallacy of denying the antecedent occurs when one takes a true statement presented in this form and concludes that 'if not P, then not Q' must also be true. That conclusion is not valid because negating the truth of the antecedent (i.e., denying the truth of P) does not necessitate the denial of its consequent." *State v. Brush*, 183 Wn.2d 550, 568 n.8, 353 P.3d 213 (2015) (Wiggins, J., concurring in part and concurring in result).

Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)). The second degree assault statute does precisely this by stating that a person commits assault if he or she "[i]ntentionally assaults *another*." RCW 9A.36.021(1)(a) (emphasis added). Further, with respect to the crime of assault more generally, *Elmi* acknowledged that "assault does not, under all circumstances, require that the specific intent match a specific victim." *Elmi*, 166 Wn.2d at 216 (citing *Wilson*, 125 Wn.2d at 218). For all these reasons, we reject Kelly's argument that the Washington legislature abrogated the transferred intent doctrine with respect to second degree assault.

Kelly's reliance on *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011), is likewise misplaced. In *Abuan*, the defendant was convicted of two counts of second degree assault after firing a gun at a person in a garage that was attached to a house where a second person heard the gunshots. *Id.* at 140-43. On appeal, the court concluded there was insufficient evidence of Abuan's intent to assault the person inside the house because (1) the State did not offer a transferred intent jury instruction and (2) there was an "absence of any injury or apprehension and imminent fear of bodily injury" because the person inside the house did not have a gun pointed at him, did not see the shooter or the gun, and could not see the shooting. *Id.* at 159. Unlike *Abuan*, here we have both a transferred intent jury instruction and ample evidence that Ms. Cope was placed in reasonable apprehension and imminent fear of bodily injury. On this record, *Abuan* is inapposite.

Next, Kelly contends that even if the transferred intent doctrine applies in *some* second degree assault cases, it does not apply in cases, like this one, where the conviction is premised on a reasonable apprehension and imminent fear of

bodily injury as opposed to physical harm. But Kelly fails to meaningfully distinguish between an assault where the defendant physically harms someone and one where the defendant only places someone in apprehension of harm. The *Elmi* court disavowed such a distinction: "The assault statute provides for the various methods of assault to be treated equally. As such, whether the unintended victim is actually battered (like in *Wilson*) or not (like in this case) is irrelevant for purposes of determining whether an assault occurred." *Elmi*, 166 Wn.2d at 217-18 (citing *Wilson*, 125 Wn.2d 212); *see also State v. Frasquillo*, 161 Wn. App. 907, 916, 255 P.3d 813 (2011) (noting that "under *Elmi*, transferred intent can also apply to victims who are only put in *apprehension* of harm").

Lastly, even if we were to agree with Kelly that the transferred intent doctrine does not apply to the second degree assault conviction at issue here, there is also sufficient evidence to establish the requisite intent to assault Ms. Cope in the absence of the transferred intent instruction. *See State v. Salamanca*, 69 Wn. App. 817, 826-27, 851 P.2d 1242 (1993) (finding sufficient evidence from which the jury could infer intent to assault another even if transferred intent instruction was "superfluous"). Although intent cannot be presumed, "it can be inferred as a logical probability from the evidence." *Id.* at 826. Ms. Cope testified that Kelly pointed the handgun toward her and her family and yelled "Call 911 or I'll shoot you"—a threat that applies equally to both Mr. and Ms. Cope.[3] And contrary to Kelly's subsequent statement to police that he saw only Mr. Cope and not Ms.

[3] *See, e.g.,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2653 (1981) (defining "you" as "the one *or ones* being addressed") (emphasis added). On the record presented here, as described in the text above, a rational trier of fact could reasonably infer that "I'll shoot you" referred to both Mr. Cope or Ms. Cope together.

Cope when he yelled "I'll shoot you," Ms. Cope testified that she was standing just a couple feet away from Mr. Cope when Kelly pointed the gun at them. This evidence, viewed favorably to the State, supports a logical inference—and would allow a rational trier of fact to find—that Kelly intended to assault Ms. Cope. *See State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996) ("jury may infer specific intent to create fear from the defendant's pointing a gun at the victim, unless the victim knew the weapon was unloaded"), effectively overruled on other grounds by *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

In short, with or without the transferred intent instruction, there is sufficient evidence to establish the elements of second degree assault against Ms. Cope.[4]

B. Prosecutorial misconduct

Kelly next argues the trial court erred in denying his motion for a new trial under CrR 7.5 based on three alleged instances of prosecutorial misconduct. We disagree.

Under CrR 7.5(a)(2), a trial court may grant a defendant's motion for a new trial based on prosecutorial misconduct "when it affirmatively appears that a substantial right of the defendant was materially affected." We review the denial of a CrR 7.5 motion for a new trial under an abuse of discretion standard. *State v. Davis*, 3 Wn. App. 2d 763, 787, 418 P.3d 199 (2018). Where, as here, the motion

[4] Additionally, the result also would be the same if we were to apply the statutory elements of second degree assault and corresponding common law. *See* RCW 9A.36.021(1)(c) ("A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [a]ssaults another with a deadly weapon."); *Elmi*, 166 Wn.2d at 215 (specific intent is the "intent to produce a specific result, as opposed to intent to do the physical act that produces the result"); *Aguilar*, 176 Wn. App. at 275 ("Under the doctrine of transferred intent, once the intent to inflict harm on one victim is established, the mens rea transfers to any other victim who is actually assaulted."). We focus here on the jury instructions because, according to Kelly, when "the government proposed the instructions, they became the elements that the government needed to prove."

for a new trial is premised on prosecutorial misconduct, the defendant must prove the prosecutor's conduct was both improper and prejudicial. *State v. Sundberg*, 185 Wn.2d 147, 151-52, 370 P.3d 1 (2016). Additionally, if the defendant objected to the improper conduct at trial, the defendant must show the misconduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant did not object, the defendant must show the misconduct was "so flagrant and ill intentioned" that "(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.'" *Id.* at 760-61 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

First, Kelly asserts the prosecutor committed misconduct by eliciting testimony in violation of a pretrial order that excluded on hearsay grounds a statement by one of the Cope children that he had "never seen a bad guy before." During trial, the prosecutor asked Ms. Cope, "When you say that everyone was shaken up, what did you see as far as, you know, how your husband was acting, how you were acting, how the children were acting?" Ms. Cope provided a lengthy answer ending with, "The things you say to kids that, you know, like . . . there's a bad guy. . . . the police will handle it." The trial court sustained defense counsel's objection to this answer and instructed the jury to disregard it.

Kelly fails to show that the prosecutor's conduct was improper. The reason that Ms. Cope eventually testified in violation of a pretrial order is not that the prosecutor asked an improper question, but rather that she provided a lengthy narrative response to a proper question. Additionally, the prosecutor warned Ms.

Cope before trial not to reference this excluded statement. Neither the trial court nor Kelly's trial counsel believed the prosecutor intentionally sought to elicit the prohibited "bad guy" statement from Ms. Cope. But even if the prosecutor's question was improper, the misconduct did not have a substantial likelihood of affecting the jury's verdict because the trial court sustained defense counsel's objection and instructed the jury to disregard the testimony, and we presume the jury followed this instruction. *See State v. Gauthier*, 189 Wn. App. 30, 39, 354 P.3d 900 (2015).

Second, Kelly alleges the prosecutor committed misconduct by attempting to shift the burden of proof. "A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). While a prosecutor can "point out a lack of evidentiary support for the defendant's theory of the case," a prosecutor may improperly shift the burden of proof by "mentioning during closing argument that the defense failed to present witnesses or by stating that the jury should find the defendant guilty based simply on the defendant's failure to present evidence to support his defense theory." *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012) (citing *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009)).

During closing arguments in this case, defense counsel argued that Kelly did not form the requisite intent to assault the Copes because he was paranoid and delusional, but did not refer to Kelly's methamphetamine use. In response, the prosecutor argued during rebuttal closing argument, "Counsel talked about the fact that the defendant was delusional and paranoid. There was evidence of that.

But you have to ask yourself where was the expert to establish the level of methamphetamine?" The trial court again sustained defense counsel's objection based on improper burden shifting and instructed the jury to disregard the remark.

Here, the prosecutor's statement that the jury must "ask [itself] where was the expert to establish the level of methamphetamine" was improper burden shifting because it told the jury that Kelly had to present expert testimony to prove he could not develop the requisite mens rea to commit the charged offenses due to his drug use. The State referred to this hypothetical expert testimony for the first time during its rebuttal closing argument, which deprived Kelly of an opportunity to explain the absence of any expert testimony.[5] Our case law recognizes, "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). But while the prosecutor's statement was improper, it did not have a substantial likelihood of affecting the jury's verdict because the trial court sustained defense counsel's objection and instructed the jury to disregard the remark. *See Gauthier*, 189 Wn. App. at 39. The trial court did not abuse its discretion in denying Kelly's motion for a new trial based on this improper statement.

[5] The State's reliance on the "missing witness doctrine" set forth in *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), is misplaced. The missing witness doctrine permits the State to "point out the absence of a 'natural witness' when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable." *Montgomery*, 163 Wn.2d at 598 (citing *Blair*, 117 Wn.2d at 485-86). *Blair* is inapposite because it involved a defendant's failure to call a fact witness that the defendant claimed would support their theory of the case, not a hypothetical expert witness the State asserted the defendant should have called. The State has not cited any authority extending the missing witness doctrine to a case, like Kelly's, where there is no evidence in the record that the defendant retained an expert who would have testified unfavorably for the defendant.

Third, Kelly avers that the prosecutor improperly denigrated the dignity of defense counsel through audible sighs and non-verbal gestures. The record indicates that one such audible sigh occurred during the following interaction outside the presence of the jury after the prosecutor argued that certain statements were inadmissible hearsay:

> MR. AUSSERER [Defense]: Well, it's not hearsay. I—Your Honor, I would appreciate if we could refrain from—
>
> THE COURT: Again, we get back to what we discussed yesterday. And, you know, I know that this—there's high emotions here. But we are—you know, this is significant and very serious for everybody here, and we need to—Ms. Hauger, if you could refrain from the sighing—the audible sighs. That would be—
>
> MS. HAUGER [Prosecutor]: I apologize. It's just that I know Mr. Ausserer. I know him to be a very competent attorney, and he knows what hearsay is.
>
> THE COURT: All right.
>
> MS. HAUGER: And I apologize. I will refrain.
>
> THE COURT: Thank you[6]

According to Kelly's post-trial motion for a new trial, jurors indicated after trial that they "observ[ed] audible responses and obvious emoting [from the prosecutor] in response to each issue raised during cross examination of all witnesses," such as eye-rolling, audible sighs, and "physically react[ing] in a negative manner during the defendant's examination."

If these allegations are correct, then the prosecutor's conduct was improper because it impugned the role or integrity of defense counsel and expressed a

[6] The trial court's reference to "what we discussed yesterday" likely relates to its prior statement to both counsel that "you're both professionals, and I expect both of you to behave that way. I don't want to be a referee."

personal opinion as to the credibility of a witness or the defendant's guilt. *State v. Lindsay*, 180 Wn.2d at 431-32, 437, 326 P.3d 125 (2014). This, too, violates the prosecutor's "duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Monday*, 171 Wn.2d at 676. But the audible sigh that is recounted above—which is the primary focus of Kelly's appellate argument—occurred outside the presence of the jury, thereby obviating any prejudicial effect it may have had on the verdict. And while jurors indicated that such improper conduct occurred throughout the trial, Kelly did not object and, thus, must show the conduct was so flagrant and ill intentioned that no curative instruction could have cured any prejudice. *Emery*, 174 Wn.2d at 760-61. Because Kelly fails to show, as he must, that a curative instruction would not have cured any prejudice from the prosecutor's improper conduct, his third and final argument also fails.[7]

C. Firearm enhancements

Finally, Kelly contends that remand is necessary because the sentencing court did not know it had discretion to run the firearm enhancements concurrently under RCW 9.94A.535, which permits a court to impose an exceptional sentence below the standard sentence range if "substantial and compelling reasons justify[] an exceptional sentence." A defendant may seek appellate review from a discretionary sentence within the standard range in "circumstances where the

[7] The trial court likewise concluded that the prosecutor's sighs and other nonverbal conduct did not affect the jury's verdict because "the fact that [the jurors] may have noted [the prosecutor's] behavior and yet rendered the verdict that they did would indicate to the Court that that was not what they were looking at in making their determination." While we have carefully scrutinized Kelly's argument on this point, the applicable standard of review is abuse of discretion and we may properly defer to the trial court's ruling on this point. *See State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) ("The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.") (quoting *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)).

court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Mandefero*, 14 Wn. App. 2d 825, 833, 473 P.3d 1239 (2020) (quoting *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017)). Because our Supreme Court has squarely held that a sentencing court has no discretion to depart from mandatory weapon enhancements, we reject Kelly's argument.

In *State v. Brown*, our Supreme Court held that "judicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement." 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 21 n.5, 391 P.3d 409 (2017). After adding a twelve-month deadly weapon enhancement to the defendant's sentence pursuant to former RCW 9.94A.310(4)(b), the sentencing court in *Brown* granted the jury's request for leniency and imposed an exceptional sentence downward of seven months on the defendant's second degree assault conviction. 139 Wn.2d at 23, 29. On appeal, the Supreme Court remanded for resentencing because the length of the sentence was shorter than the enhancement range. *Id.* The court relied on the "absolute" language of the firearm enhancement statute stating, "*Notwithstanding any other provision of law*, any and all deadly weapon enhancements under this section are *mandatory, shall be served in total confinement*, and shall not run concurrently with any other sentencing provisions." *Id.* at 26 (quoting former RCW 9.94A.310(4)(e)).

As the Supreme Court held in *Brown* and the plain language of the applicable sentencing statutes confirms, a sentencing court does not have discretion to impose an exceptional sentence downward by running firearm

enhancements concurrently instead of consecutively. The current version of the firearm enhancement statute mirrors the statute in *Brown* by stating, "Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and *shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements*." RCW 9.94A.533(e) (emphasis added). Thus, the sentencing court correctly concluded it had no discretion to run the firearm enhancements concurrently as part of an exceptional sentence.

Kelly argues that *Brown* is no longer controlling on this issue following the Supreme Court's recent decision in *Houston-Sconiers*, 188 Wn.2d at 21 n.5. This argument is unconvincing because *Houston-Sconiers* overruled *Brown* only to the extent its holding applied to juvenile sentencing. The court held as follows:

> [S]entencing courts must have complete discretion to consider mitigating circumstances *associated with the youth of any juvenile defendant*, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion *with regard to juveniles*, they are overruled. Trial courts must consider mitigating qualities *of youth at sentencing* and must have discretion to impose any sentence below the otherwise applicable [statutory] range and/or sentence enhancements.

Id. (citing *Brown*, 139 Wn.2d at 29) (emphasis added). As Kelly acknowledges, our court has issued multiple opinions holding that *Brown* is and remains good law with respect to adult sentencing and that a sentencing court must run firearm

enhancements consecutively when sentencing adults.[8] Consistent with this controlling precedent, we affirm Kelly's sentence.

Affirmed.

Feldman, J.

WE CONCUR:

Hazelrigg, ACJ

Mann, J.

[8] *See Mandefero*, 14 Wn. App. 2d at 830-32 ("*Houston-Sconiers* overrules *Brown* only as it applies to juveniles"); *State v. Brown*, 13 Wn. App. 2d 288, 291, 466 P.3d 244 (2020) ("*Houston-Sconiers* overruled *Brown* with regard to juveniles only"). Division Three of the Court of Appeals has reached the same conclusion. *State v. Wright*, 19 Wn. App. 2d 37, 52, 493 P.3d 1220 (2021) ("Brown remains good law as applied to adult offenders"). Similarly, Kelly's argument that we should rely on Justice Madsen's concurring opinion in *Houston-Sconiers* stating that a trial court has "discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence," 188 Wn.2d at 34, has also been squarely rejected by our court. *See Brown*, 13 Wn. App. 2d at 291 (our court "does not have the authority to overrule *Brown*" because "a decision by the Washington Supreme Court is binding on all lower courts of the state").

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 103167-0**, 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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Date: June 24, 2024

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