No. 71644-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CHARLES LONGSHORE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 12-1-00119-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. STATE'S RESTATEMENT OF LONGSHORE'S ASSIGNMENTS OF ERROR

1) The trial court erred by entering a conviction for felony harassment because Mr. Longshore's threat was not made "without lawful authority."

2) The court erred when it instructed the jury that "lawful force" meant merely "authorized by law." This was the equivalent of failing to instruct the jury on that element altogether, thus depriving Mr. Longshore of due process.

3) The trial court erred by entering a conviction for possession of methamphetamine because the State only proved that trace amounts of the drug were found in a pipe, not visible to the naked eye and in a vehicle that he only temporarily borrowed.

4) The trial court erred when it entered a conviction for possession of methamphetamine when defense counsel did not request an instruction on unwitting possession and thus rendered received ineffective assistance of counsel.

5) The trial court erred when it admitted the identifications made by Officer Patton which was unduly suggestive in violation of due process.

6) The trial court erred by entering a conviction for felony eluding because the remaining admissible evidence did not prove that Mr. Longshore was driving the car at the time of the elude.

B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The State charged Longshore with one count of felony harassment for threatening to kill Justin Elston. The statutory definition of the crime of harassment requires the State to

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prove that the threat was made without lawful authority. The State contends that this element was proved beyond a reasonable doubt in the instant case because there was no evidence at trial to show that Longshore had a good faith belief in the necessity of killing or threatening to kill Elston and because the evidence showed that it was objectively unreasonable for Longshore to believe such conduct was necessary on the facts of this case. As a matter of law, in the absence of this evidence, there was no basis to conclude that Longshore's threats were lawful. (This section of the State's brief is in response to section A, pages 10-13, of the Supplemental Brief of Appellant).

2. Longshore contends that his due process rights were violated in this case because, he alleges, the trial court's definition of the term "lawful authority" was flawed because it was "circular" and therefore failed to provide any definition. However, controlling authority holds that the failure to give a definitional instruction is not constitutional error. Longshore did not raise this issue in the trial court; therefore, he did not preserve this issue for appeal. Even if Longshore had preserved the issue for review, the State contends that the trial court's instructions in this case were correct. (This portion of the State's brief is in response to Longshore's section B, pages 14-15, of the Supplemental Brief of Appellant).

3. Longshore alleges that there was insufficient evidence at trial to sustain the jury's verdict of guilty for the charge of harassment because, he alleges, there was insufficient evidence that he lacked lawful authority to threaten to kill Elston. The State counters that the evidence presented at trial proves beyond a reasonable doubt that the only threat to Longshore, against which Longshore responded with a threat to kill, was the threat of a transient restraint and the imminent arrival of police to investigate his crime of trespassing. On these facts, Longshore's threat to kill was beyond what a reasonably prudent person would find necessary; therefore, the absence of lawful authority was proved beyond a reasonable doubt. (This

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section of the State's brief is in response to section C (with subsections 1-4), pages 16-26, of the Supplemental Brief of Appellant).

4. Longshore reiterates his contention that his due process rights were violated based upon his allegation that the trial court's jury instruction defining "lawful authority" was flawed. This argument is substantially similar to Longshore's argument at section B of his brief, at pages 14-15. In response, the State avers again that Longshore has not properly preserved this issue for appeal, and the State respectfully refers the court to the State's briefing on this issue, above, at section 2 of the State's response brief. (This section of the State's brief is in response to section D, pages 26-30, of the Supplemental Brief of Appellant).

5. Longshore avers that the evidence at trial was insufficient to sustain the jury's verdict of guilty for possession of a controlled substance. The State responds that the evidence was sufficient to sustain the jury's verdict. (This portion of the State's brief is in response to Longshore's section E, pages 30-34, of the Supplemental Brief of Appellant).

6. Longshore avers that his trial attorney was ineffective because the attorney rejected an unwitting possession instruction in regard to the charge of possession of a controlled substance. The State counters that rejection of an unwitting possession instruction was Longshore's right and that it was a legitimate trial strategy for him to decline the instruction because it would have imposed upon him a burden of proof that he would not bear in the absence of the instruction. (This portion of the State's brief is in response to Longshore's section F, pages 35-40, of the Supplemental Brief of Appellant).

7. A police officer, Officer Patton, was an eye-witness to Longshore's act of driving while Longshore was engaged in the crime of attempting to elude pursuing police vehicles. Longshore contends on appeal that Officer Patton's trial

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testimony identifying him as the driver violates his due process rights because, he alleges, Officer Patton's identification of him was the product of "improper suggestion" and was, therefore, unduly suggestive. The State counters that because Officer Patton's identification of Longshore was contemporaneous with his view of the crime in progress and was based upon his prior contacts with Longshore rather than from a photo lineup or show-up, the accuracy of his identification goes to the weight of the testimony rather than its admissibility. (This portion of the State's brief is in response to Longshore's section G, pages 40-46, of the Supplemental Brief of Appellant).

8. Longshore avers that without Officer Patton's testimony the evidence was insufficient to sustain the jury's verdict of guilty for the charge of attempting to elude a police vehicle because, Longshore alleges, without this testimony there was insufficient evidence to prove that Longshore was the driver of the eluding vehicle. The State responds that Officer Patton's testimony was properly admitted, but that even without Officer Patton's testimony, there was other sufficient evidence on review to sustain the jury's verdict. (This portion of the State's brief is in response to Longshore's section H, pages 46-50, of the Supplemental Brief of Appellant).

C. FACTS

In the days and months leading up to March 25, 2012, Charles Longshore had made many trips and visits to the Firwood Court complex in Shelton, Washington. RP 68-69, 87-88. He was seen frequently in a goldish-beige Dodge Intrepid with tinted windows and a distinct, little

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sticker with feathers on it. RP 43-44, 68-69, 87-88. Because the residents and owner of the complex suspected criminal activity, Longshore was eventually trespassed from the premises. RP 65, 69, 85.

On March 25, 2012, Longshore returned to Firwood Court, driving the same goldish-beige Dodge Intrepid with the tinted windows and little sticker with feathers on it. RP 42-44, 70-71, 80, 85, 89. Neighbors called 911. RP 40, 69. Justin Elston tried to box-in Longshore's car so he could hold him until police arrived. RP 41, 48-49, 69. In response, Longshore began moving about like he had a gun or was reaching for a gun, and he threatened the neighbors that he would kill every one of them and would also kill their families. RP 41, 43, 46, 49-50, 70, 77, 86. At least a couple of the neighbors were afraid that Longshore would carry out the threats. RP 43, 46-47, 71, 88.

Fearing for his life and for the lives of others, Elston moved his car and allowed Longshore to drive away. RP 43. Elston noted Longshore's license number. RP 44-46. When Longshore drove away in the goldish-beige Dodge Intrepid, he had at least one female passenger. RP 42, 89.

Officer Patton of the Shelton Police Department was on patrol and received a dispatch about the Firwood Court incident. RP 128-29.

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Twelve minutes later, Patton received a call that a fellow officer had contacted or attempted to contact the Dodge Intrepid. RP 130. The Dodge Intrepid had the same license number as the one reported at Firwood Court. RP 131. Rather than stop for police, the Dodge ran, and police then took up a pursuit. RP 131.

Officer Patton listened to the radio traffic and tried to determine the path of the fleeing Dodge Intrepid. RP 131-32. He determined that the car may be heading for the intersection of Lake Boulevard and Wyoming, so he headed there, and when he arrived he put out spike strips and blocked other traffic from entering the intersection. RP 131-32. But one of the pursuing officers put out a miscommunication and mistakenly said that the Dodge was now traveling in the opposite direction; so, Patton put away his spike strips and was about to leave when he then saw the fleeing Dodge and pursuing marked police cars, with lights and sirens activated, speeding toward him. RP 132-33, 240.

The fleeing Dodge sped right past Patton, within feet, and went right through a stop sign without making any attempt to stop. RP 133. As the Dodge sped past, Patton saw the driver and recognized him to be Charles Longshore. RP 133-34. Patton then joined the pursuit and was

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the third in a line of three police cars that were pursing Longshore. RP 135-36.

During the pursuit, Deputy Clark of the Mason County Sheriff's Office was directly behind Longshore, and at one point Deputy Clark got a good look at Longshore's face when he saw it in Longshore's side, rearview mirror when Longshore had to slow to make a turn during the pursuit. RP 247, 249. Deputy Clark knew Longshore from prior contacts, and he was 100% sure that it was him. RP 250. As Longshore was driving during the pursuit, Deputy Clark saw him taking off a coat, or something, and suspected that Longshore might be reaching for, or aiming, a gun; so, Deputy Clark began to move back and forth in the roadway so as to avoid being too stationary of a target. RP 250.

During the pursuit, Officer Patton lost sight of Longshore and the Dodge for a time, and when he next saw him his observations were not as good as they were on the corner of Wyoming and Lake Boulevard, but Patton could see that the driver was now wearing some kind of dark hooded sweater or jacket. RP 137.

Officer Patton now became the lead police car in the pursuit. RP 139. The pursuit entered a residential neighborhood where children were

present. RP 139. Because children and other residents were put in danger by the pursuit, Officer Patton slowed to 30 mph and turned off his lights and siren. RP 139. Longshore continued to speed away as Patton watched the distance grow between them. RP 139.

Once out of the residential area, Patton resumed lights and siren and tried then to catch up to Longshore and the Dodge Intrepid. RP139. The chase had meandered over an area of at least ten miles and had put numerous innocent civilians and police officers in danger, as Longshore drove at speeds of up to 110 mph and ran through traffic signals without stopping. RP 140-50, 219-23, 241-46.

Police soon caught up with the Dodge Intrepid, where it was found at the end of a rural road. RP 152, 247. Longshore and two females were found near the car, hiding behind a shed, and were taken into custody. RP 152, 247. Witnesses identified Longshore and the Dodge Intrepid as the same car that he was driving when he left Firwood Court. RP 44, 46, 68, 86, 125, 153.

A search of the Dodge revealed a methamphetamine pipe, with unburned methamphetamine in it, that was found in a black sock that was

stuck between the driver's door and the driver's seat where Longshore had been sitting as he drove the car. RP 157, 159-60, 163, 262.

Based on these facts, the State charged Longshore with felony harassment (threat to kill), attempting to elude a pursuing police vehicle, and possession of a controlled substance (methamphetamine). CP 99-101. After receiving the evidence cited above, the jury convicted Longshore on all counts. CP 70-72.

D. ARGUMENT

1. The State charged Longshore with one count of felony harassment for threatening to kill Justin Elston. The statutory definition of the crime of harassment requires the State to prove that the threat was made without lawful authority. The State contends that this element was proved beyond a reasonable doubt in the instant case because there was no evidence at trial to show that Longshore had a good faith belief in the necessity of killing or threatening to kill Elston and because the evidence showed that it was objectively unreasonable for Longshore to believe such conduct was necessary on the facts of this case. As a matter of law, in the absence of this evidence, there was no basis to conclude that Longshore's threats were lawful. (This section of the State's brief is in response to section A, pages 10-13, of the defendant's brief).

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Longshore disputes his conviction for harassment because he avers that the State did not prove beyond a reasonable doubt that his threat to kill Justin Elston was unlawful. Br. of Appellant at 10-13.

Among other charges, the State in this case charged Longshore with one count of felony harassment, alleging that he...

> Knowingly and without lawful authority, did threaten to kill another immediately or in the future, to wit: Justin Elston, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out; contrary to RCW 9A.46.020(1)(a)(i) and (2)(b) and against the peace and dignity of the State of Washington.

CP 100 (Second Amended Complaint, Count II).

The relevant statutory language defines the crime of felony harassment, as follows:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; ...and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

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> (2) A person who harasses another is guilty of a class C felony if any of the following apply... (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person....

RCW 9A.46.020(1)(a)(i), (2)(b)(ii). The jury found Longshore guilty of the charge of felony harassment. CP 71 (Verdict Form B).

Longshore contends that because the words "without lawful authority" appear in the statute as precondition to culpability for the crime of harassment, the words constitute an element of the offense that the State must prove beyond a reasonable doubt. Br. of Appellant at 10-13. Longshore contends that the State failed to prove beyond a reasonable doubt that his act of threatening to kill Elston was unlawful. *Id.*

It is axiomatic that the State bears the burden of proving every element of an offense beyond a reasonable doubt. *See, e.g., State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996). And, "[i]f a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt." *Id.* at 11 (citations omitted). But the State only bears this burden if the absence of the defense "is an ingredient of the

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offense *and there is some evidence of the defense*." *State v. Box*, 109 Wn.2d 320, 327, 745 P.2d 23 (1987) (emphasis added) (citing *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

The State contends that in the instant case a diligent review of the record shows that evidence was, as a matter of law, insufficient to establish the defense that Longshore now asserts on appeal. Without providing citations to the record, Longshore argues on appeal that his threat to kill Elston was lawful because he was acting in self-defense. Br. of Appellant at 13. But there was no evidence presented to show that the degree of force threatened by Longshore was reasonable or necessary.

As provided by statute, the threatened use of force is lawful under certain specified circumstances, as follows:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;
>
> (2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious

trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;

(4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;

(5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety;

(6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

RCW 9A.16.020. Without providing a citation to the record, Longshore avers that his threat to kill Elston was lawful because he "presented evidence at trial that access to his vehicle had been intentionally and unlawfully restricted and that he and his colleagues were being confined against their will." Br. of Appellant at 13. The State contends that

subsections (1), (2), (4), (5), and (6) of RCW 9A.16.020 are clearly inapplicable to these facts. Thus, the State contends, the only arguably applicable provision of the lawful use of force statute to the facts of the instant case is subsection (3).

The evidence presented at trial showed that Elston blocked in Longshore's vehicle and prevented Longshore from driving away in the vehicle. RP 41, 48-49, 69. Elston blocked Longshore because he believed that Longshore had been trespassed from the premises; Elston had called 911 for police assistance; and he intended to hold Longshore until the police arrived. RP 40-41, 48-49, 54, 69. There is no evidence to show that Longshore's companions were not free to come and go or to walk away at will; nor is there evidence that Longshore was prevented from walking away without his vehicle. But irrespective of whether Longshore or his companions were free to leave without the vehicle, there is no evidence that Longshore feared injury or damage of any kind. He was told that police had been called and were on the way, thus indicating that he was in no danger and that the restraint placed upon him was temporary and would soon be remedied by police assistance. RP 54. The State contends that these facts do not present even an iota of evidence to

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establish the necessity of killing, or threatening to kill, Elston; nor do these facts present evidence any evidence whatsoever that killing Elston, or threatening to kill him, was objectively reasonable.

"'To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.'" *State v. Graves*, 97 Wn. App. 55, 62, 982 P.2d 627 (1999) (quoting *State v. Dyson*, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997)). In the instant case, there is argument, but there is no citation to the record where there is evidence that Longshore had a good faith belief in the necessity of killing, or threatening to kill, Elston, and there is no evidence from which a jury could find that such a belief would have been subjectively reasonable.

The use of the phrase "without lawful authority" as an element of RCW 9A.46.020(1) is similar to use of the phrase "unless it is excusable or justifiable" as an element in a prior version of the second-degree murder statute, which was found at RCW 9.48.040 but is now superseded by RCW 9A.32.030. *See, e.g., Bowman v. State,* 162 Wn.2d 325, 328, 172 P.3d 681 (2007); *State v. Manuel*, 94 Wn.2d 695, 619 P.2d 977 (1980); *In re Reed*, 136 Wn. App. 352, 355, 149 P.3d 415 (2006); *State v. Stallworth*,

19 Wn. App. 728, 731, 577 P.2d 617 (1978). The older version of the second-degree murder statute read as follows: "The killing of a human being, unless it is excusable or justifiable, is a murder in the second degree when...." RCW 9.48.040 (1975).

In *Stallworth* the court reasoned that "[u]nder RCW 9.48.040 one of the elements of second-degree murder is the killing without lawful excuse or justification." *Stallworth*, 19 Wn. App. At 775. Subsequent to *Stallworth*, the Washington Supreme Court confirmed that under RCW 9.48.040 "lack of justification was an element of the crime of second degree murder." *State v. Manuel*, 94 Wn.2d 695, 698, 619 P.2d 977 (1980). And the Court proclaimed that the defendant asserting the defense is under no burden to establish the defense by even so much as a preponderance of the evidence. *Id.* But, citing its prior decision in *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977), the Court clarified that "the defendant's only burden was to produce some evidence tending to establish that defense." *Id.*

In the instant case, there is no evidence whatsoever to show that Longshore had a good faith belief in the necessity of killing (or threatening to kill) Elston or that such a belief, if he had one, would have

been objectively reasonable. It is not a matter of the weight or degree of the evidence; there simply is no evidence on this point.

2. Longshore contends that his due process rights were violated in this case because, he alleges, the trial court's definition of the term "lawful authority" was flawed because it was "circular" and therefore failed to provide any definition. However, controlling authority holds that the failure to give a definitional instruction is not constitutional error. Longshore did not raise this issue in the trial court; therefore, he did not preserve this issue for appeal. Even if Longshore had preserved the issue for review, the State contends that the trial court's instructions in this case were correct. (This portion of the State's brief is in response to Longshore's section B, pages 14-15, of the Supplemental Brief of Appellant).

The State does not dispute that, so long as there is some evidence to support the defense, the absence of lawful authority is an element that the State is required to prove beyond a reasonable doubt in order to prove the crime of harassment. And, the State does not dispute that in this case the "to convict" jury instruction in regard to the charge of harassment instructed the jury that one of the elements that must be proved beyond a reasonable doubt was that "the defendant acted without lawful authority." CP 90 (Jury Instruction No. 15).

Longshore contends that his trial was flawed because, he contends, the court's definition of "lawful authority" was flawed. Br. of Appellant

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at 14-15. But the trial court provided the jury with an accurate statement of law when it provided the jury with an instruction that stated that "[a] person acts without lawful authority when that person's acts are not authorized by law." CP 99 (Jury Instruction No. 14). Longshore contends that the trial court's instruction was circular and was, therefore, no instruction at all. Br. of Appellant 14-15.

But, Longshore did not raise this issue in the trial court. To raise this issue for the first time on appeal, Longshore must show that the alleged error is both constitutional and manifest. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 97, 105, 217 P.3d 756 (2009). "[T]he 'constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.'" *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009), quoting *State v. Fowler,* 114 Wn.2d 59, 69–70, 785 P.2d 808 (1990). Thus, the alleged error is not constitutional. And, because there was no evidence that Longshore believed in good faith that it was necessary to threaten to shoot and kill Elston, the alleged error also is not manifest.

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The evidence presented at trial shows only that Longshore threatened to shoot and kill Elston because the police were on the way and Longshore wanted to escape before the police arrived. RP 40-41, 43, 46, 48-50, 69-70, 77, 86. These facts do not give rise to any known defense of lawful authority that can be found in the common law or in Washington statutory law. Thus, the State contends, this element was proved beyond a reasonable doubt.

3. Longshore alleges that there was insufficient evidence at trial to sustain the jury's verdict of guilty for the charge of harassment because, he alleges, there was insufficient evidence that he lacked lawful authority to threaten to kill Elston. The State counters that the evidence presented at trial proves beyond a reasonable doubt that the only threat to Longshore, against which Longshore responded with a threat to kill, was the threat of a transient restraint and the imminent arrival of police to investigate his crime of trespassing. On these facts, Longshore's threat to kill was beyond what a reasonably prudent person would find necessary; therefore, the absence of lawful authority was proved beyond a reasonable doubt. (This section of the State's brief is in response to section C (with subsections 1-4), pages 16-26, of the Supplemental Brief of Appellant).

Longshore contends that there was insufficient evidence to sustain the jury's verdict finding him guilty of harassment of Elston and Aldridge.

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Br. of Appellant at 16. But the State did not charge Longshore with harassment toward Aldridge, and the jury instructions did not mention Aldridge. CP 73-97, 99-101. The State charged Longshore with one only count of harassment and alleged only Elston as a victim. CP 73-97, 99-101.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Longshore avers that his act of harassment committed against Elston was legally justified because, he contends, Elston could have been charged with unlawful imprisonment. Br. of Appellant at 17. But the mere fact that Elston might face charges does not automatically excuse

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Longshore from culpability for any crime that he might commit. And it is not clear that Elston actually committed any crime when he restrained Longshore's vehicle in order to hold Longshore until police could arrive. RP 40-41, 48-49, 54, 69. Elston potentially benefits from the following statutory defense on these facts:

> Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public.

RCW 9A.16.020(4). Regardless of whether Elston's conduct was legally authorized, however, the degree of force he used to restrain Longshore's vehicle was slight. He blocked in Longshore's vehicle with the sole intent of holding Longshore for the transient time necessary to allow the police to arrive, and with the exception of the imminent arrival of the police, there was no threat to Longshore. RP 40-41, 48-49, 54, 69.

Thus, Longshore's threatened use of force was not justified. *State v. Walden*, 131 Wn. 2d 469, 474, 932 P.2d 1237 (1997). "[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the

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defendant." *Id.* (citations omitted). In the instant case, the facts show that a reasonably prudent person would not find homicide or the threat of homicide *necessary* when the only possible threat that was directed toward the person was a transient restraint and the imminent arrival of police. "Deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injury.'" *Id.*, quoting 13A Royce A. **Ferguson**, Jr. & Seth Aaron Fine, Washington Practice, *Criminal Law* § 2604, at 351 (1990); RCW 9A.16.050(1); 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7(b) (1986).

A person who is privileged to cause injury to another is also privileged to threaten to cause such injury, and such threats may be lawfully made when the "circumstances justify violent action." *State v. Smith*, 111 Wn.2d 1, 9, 759 P.2d 372 (1988). But in the instant case there is no evidence that the circumstances merited violent action, and, in particular, there is no evidence that Longshore had a good faith belief that he was in any danger whatsoever. Thus, there is no evidence of any lawful justification for his threat to kill Elston. On these facts, the crime of harassment was proved beyond a reasonable doubt. RCW 9A.16.020;

RCW 9A.46.020(1); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

4. Longshore reiterates his contention that his due process rights were violated based upon his allegation that the trial court's jury instruction defining "lawful authority" was flawed. This argument is substantially similar to Longshore's argument at section B of his brief, at pages 14-15. In response, the State avers again that Longshore has not properly preserved this issue for appeal, and the State respectfully refers the court to the State's briefing on this issue, above, at section 2 of the State's response brief. (This section of the State's brief is in response to section D, pages 26-30, of the Supplemental Brief of Appellant).

Longshore avers that he was denied due process because, he alleges, the trial court's instruction to the jury defining "lawful authority," was flawed. Br. of Appellant at 26-30. Longshore did not raise this issue in the trial court. To raise this issue for the first time on appeal, Longshore must show that the alleged error is both constitutional and manifest. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 97, 105, 217 P.3d 756 (2009).

On the merits, however, this issue raised by Longshore is answered by the same legal analysis as was presented in section 2, above. To avoid

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redundancy, the State respectfully refers the court to its argument in section 2, above, on this issue.

5. Longshore avers that the evidence at trial was insufficient to sustain the jury's verdict of guilty for possession of a controlled substance. The State responds that the evidence was sufficient to sustain the jury's verdict. (This portion of the State's brief is in response to Longshore's section E, pages 30-34, of the Supplemental Brief of Appellant).

To argue his assertion that the evidence was insufficient to sustain the jury's verdict of guilty for the possession of a controlled substance, Longshore, without a citation to the record, alleges factual assertions that are in dispute. For example, Longshore alleges as fact that he "did not own the vehicle in which the drugs were found" and that "the record indicated that Mr. Cuzick was both the driver and owner of the Dodge." Br. of Appellant at 33.

On a challenge to the sufficiency of the evidence, the reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by*

Crawford v. Washington. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Mere proximity is insufficient to establish possession. *Id.* To have possession, the person must exercise dominion and control over the substance or the premises where the substance is found. *Id.* Such premises may include a vehicle. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

In the instant case, to prove the charge of eluding, the State offered testimony that Longshore was the driver of the Dodge Intrepid as it fled from police. RP 133-34, 247, 249. The evidence suggested that Longshore had been in possession for a period of time long enough to have been frequently seen driving the vehicle. RP 43-44, 68-69, 87-89,

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125-25. The State provided testimony that methamphetamine was found between the driver's seat and the driver's door where Longshore had been sitting. RP 157, 159-60, 163, 262. These facts are sufficient to prove that Longshore possessed the drug in the pipe that was located next to where he was sitting the car that he controlled. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004); *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

6. Longshore avers that his trial attorney was ineffective because the attorney rejected an unwitting possession instruction in regard to the charge of possession of a controlled substance. The State counters that rejection of an unwitting possession instruction was Longshore's right and that it was a legitimate trial strategy to decline the instruction because it would have imposed upon him a burden of proof that he would not bear in the absence of the instruction. (This portion of the State's brief is in response to Longshore's section F, pages 35-40, of the Supplemental Brief of Appellant).

Longshore voluntarily, knowingly and intelligently chose not to testify in the instant case. RP 378-79. The record does not show Longshore's reason for making this decision, other that he was deferring to the advice of his attorney. RP 378-79. Although a defendant's silence

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is never a reason to infer guilt, in regard to the charge of possession of a controlled substance, one of the potential reasons that a defendant may choose not to testify is that the defendant in fact knowingly possessed a controlled substance, as charged, so that in such circumstances the defendant might be better advised to rely upon requiring the State to meet its burden of proof rather than to testify. While it obviously cannot, and should not, be presumed, or even suggested, that a defendant is guilty because he did not testify, the defendant's testimony might be ill advised in such cases where the true facts establish the elements of the crime beyond a reasonable doubt, because in such cases the assertion of the defense of unwitting possession would not be available, absent a subornation of perjury. The point is, of course, that nothing, not even that counsel was ineffective, can be assumed on these facts.

To prove the crime of possession of a controlled substance in the instant case, the State was required to prove that on the date alleged Longshore unlawfully possessed a controlled substance. RCW 69.50.4013(1). "In Washington, it is well settled that the defendant bears the burden of proving unknowing possession, as opposed to the State bearing the burden of proving knowing possession." *State v. Huff*, 64 Wn.

App. 641, 654, 826 P.2d 698 (1992); *see also*, *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

To assert the defense of unwitting possession, Longshore would have been required to prove by a preponderance of the evidence that his possession of the methamphetamine was unwitting. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

Thus, the defense of unwitting possession would have been inconsistent with Longshore's other defense that he was not the driver of the Dodge Intrepid. The State bore the burden of proving possession beyond a reasonable doubt. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Therefore, it was reasonable trial strategy for Longshore's counsel to avoid assuming the burden of proving by a preponderance of the evidence that Longshore's possession was unwitting. *State v. Coristine*, 177 Wn.2d 370, 378-79, 300 P.3d 400 (2013); *State v. Lynch*, 178 Wn.2d 487, 309 P.3d (2013).

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive

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the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011). Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33.

It was a legitimate trial strategy for Longshore's trial counsel to forego the affirmative defense of unwitting possession. The defense would have imposed upon Longshore a burden of proof that he had no apparent ability to satisfy. The State bore the burden of proving beyond a reasonable doubt that Longshore possessed the methamphetamine at issue in this case. Because it was a legitimate trial strategy for trial counsel to focus the jury's attention upon the State's burden rather than to distract from that burden by creating a burden for Longshore, trial counsel was not ineffective. *Id.*

7. A police officer, Officer Patton, was an eye-witness to Longshore's act of driving while Longshore was engaged in the crime of attempting to elude pursuing police vehicles. Longshore contends on appeal that Officer Patton's trial testimony identifying him as the driver violates his due process rights because, he alleges, Officer Patton's identification of him was the product of

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"improper suggestion" and was, therefore, unduly suggestive. The State counters that because Officer Patton's identification of Longshore was contemporaneous with his view of the crime in progress and was based upon his prior contacts with Longshore rather than from a photo lineup or show-up, the accuracy of his identification goes to the weight of the testimony rather than its admissibility. (This portion of the State's brief is in response to Longshore's section G, pages 40-46, of the Supplemental Brief of Appellant).

Officer Patton was an eye-witness to the fact that Longshore was the driver of the Dodge Intrepid that was being pursued by police as Longshore attempted to elude the pursuing police officers. RP 133-34. Officer Patton did not identify Longshore from a police lineup or from a photo montage. Instead, as stated, Officer Patton was an eye-witness. He saw Longshore driving. RP 133-34. Longshore argues that this identification violates his due process rights because, he alleges, the identification was unduly suggestive. Br. of Appellant 40-46.

"[A]ny evidence tending to identify the accused is relevant, competent, and therefore, admissible." *State v. Gosby,* 85 Wn.2d 758, 760, 539 P.2d 680 (1975). Whether a witness's identification is reliable and what weight to give it are issues for the jury to resolve, considering any uncertainty or inconsistencies in the testimony. *State v. Kinard,* 39 Wn. App. 871, 874, 696 P.2d 603 (1985); *see Gosby,* 85 Wn.2d at 760.

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8. Longshore avers that without Officer Patton's testimony, the evidence was insufficient to sustain the jury's verdict of guilty for the charge of attempting to elude a police vehicle because, Longshore alleges, without this testimony there was insufficient evidence to prove that Longshore was the driver of the eluding vehicle. The State responds that Officer Patton's testimony was properly admitted, but that even without Officer Patton's testimony, there was other sufficient evidence on review to sustain the jury's verdict. (This portion of the State's brief is in response to Longshore's section H, pages 46-50, of the Supplemental Brief of Appellant).

Longshore contends that without Officer Patton's testimony identifying him as the driver, there was insufficient evidence to sustain the jury's verdict finding him guilty attempting to elude a police officer. Br. of Appellant at 46-50.

The State responds, first, that Officer Patton's identification testimony was correctly admitted at trial and that, therefore, the reviewing court need not speculate about what proof would be sufficient if Officer Patton's testimony not been introduced at trial. (For support of this argument, please see the State's argument in section 7, above).

Second, there was more than one eye-witness to identify Longshore as the driver. RP 247-250. Deputy Clark, also, testified that he

saw Longshore driving the Dodge Intrepid during the police pursuit. RP 247-250.

Finally, because Longshore raises another sufficiency of the evidence argument, the State reiterates here that circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And, the reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). In the instant case, there is evidence that Longshore was driving when he left the apartment complex before police arrived. RP 42-43, 89. There is evidence that when the fleeing car finally came to a stop after the police pursuit, Longshore was the only male associated with the car, and he was found hiding behind a shed near the stalled-out car. RP 152, 247. Aside from the fact that two eye-witnesses identified Longshore as the driver during the pursuit, there was ample circumstantial evidence to support an inference that Longshore was the driver. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004); *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

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E. CONCLUSION

The State asks the court to deny Longshore's appeal and to sustain his convictions in this case.

DATED: May 2, 2014.

MICHAEL DORCY
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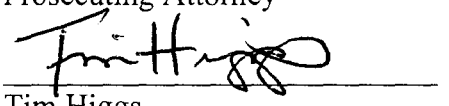

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