Supreme Court No. 99873-6
Court of Appeals No. 54348-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID EDWARD SMALLEY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

David Edward Smalley requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Smalley, No. 54348-6-II, filed on May 11, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. To convict Mr. Smalley of witness tampering, the State was required to prove that he attempted to induce Mr. Chambers to testify falsely—that is, to make a statement that Mr. Smalley believed to be false. The State attempted to meet this burden by presenting recorded jail calls in which Mr. Smalley requested that a friend ask Mr. Chambers to sign a statement saying the stabbing was an accident. But the State presented no evidence that Mr. Smalley was aware Mr. Chambers did not believe the stabbing was an accident. Did the State fail to prove witness tampering?

2. An essential element of assault in any degree is the use of unlawful force. Where the information failed to allege that Mr. Smalley assaulted Mr. Chambers with unlawful force, did Mr. Smalley receive constitutionally inadequate notice?

C. STATEMENT OF THE CASE

One day, Xavier Chambers, an acquaintance of David Smalley's, visited Mr. Smalley in his garage. RP 69–70, 383. Mr. Chambers asked if he could borrow a bicycle or some money for bus fare. RP 70, 384. Mr. Smalley gave him some cash. RP 73, 384. Mr. Chambers then asked for some methamphetamine, and Mr. Smalley gave him a small piece. RP 74–75, 384, 388. Offended by a perceived slight, Mr. Chambers dropped the methamphetamine on the garage floor and crushed it under his foot. RP 77, 130, 389.

Mr. Smalley's and Mr. Chambers's accounts diverge at this point. According to Mr. Chambers, Mr. Smalley walked over to where he stood in the garage, called him a racial slur, and stabbed him in the abdomen. RP 78. By contrast, Mr. Smalley testified that he attempted to escort Mr. Chambers out of his garage while holding a pocketknife he had used to cut off a piece of methamphetamine. RP 388, 391–92. As Mr. Smalley closed the garage door, Mr. Chambers bumped his head on it; he then spun around, bumped into Mr. Smalley, and inadvertently drove his abdomen into Mr. Smalley's pocketknife. RP 391–92.

Panicking, Mr. Smalley found Mr. Chambers a T-shirt to use to stop the bleeding. RP 83–84. At Mr. Smalley's urging, Mr. Chambers left the garage and walked to a clinic a few blocks away. RP 83–84, 86, 394. Mr. Chambers was then transported to a hospital, where doctors confirmed the knife had not injured any vital organs. RP 94–95, 294–95, 306. While hospitalized, Mr. Chambers initially told a Lakewood police officer a man named "Tony" stabbed him "accidentally," but eventually said that Mr. Smalley was the one who stabbed him. RP 105, 134, 156–57, 171, 186–87.

The State charged Mr. Smalley with first-degree assault and witness tampering.[1] CP 6–7. The witness tampering charge was based on a series of phone calls Mr. Smalley placed from jail to a friend named McKenna Melton. Ms. Melton told Mr. Smalley that Mr. Chambers "told everybody" that Mr. Smalley did not stab him "on purpose." RP 271–72; Ex. 32 at 5, 8, 18; Ex. 6A, 3 4/7/19 at 1:10–1:19, 3:44–4:04, 9:27–9:40. Relieved, Mr. Smalley repeated a request he had made to Ms. Melton during a call the previous day, to approach Mr.

[1] The State also charged Mr. Smalley with possession of a controlled substance, based on methamphetamine found on his person during a search incident to arrest. CP 6-7; RP 223-24. The Court of Appeals reversed the conviction for unlawful possession of a controlled substance in light of State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).

Chambers and ask whether he would be willing to sign a statement that the stabbing was an accident. RP 271; Ex. 3 at 1–3, 7–8, 18–19; Ex. 6A, 4/6/19, at 0:32–1:22, 4/7/19 at 3:05–3:31, 9:40–9:58.

Over the course of the remaining calls, Mr. Smalley grew frustrated that Ms. Melton had not been able to find Mr. Chambers. RP 272–73; Ex. 3 at 41, 45, 47, 49–50, 53; Ex. 6A 4/12/19 (1) at 1:58–2:19; 4/12/19 (2) at 0:45–1:15; 4/13/19 at 0:16–0:40; 4/23/19 at 0:31–0:57, 3:11–3:51. The calls contain no suggestion Mr. Chambers believed the stabbing was intentional or Mr. Smalley was aware of such a belief. Ex. 6A.

Following a bench trial, the trial court acquitted Mr. Smalley of first-degree assault and found him guilty of second-degree assault instead. RP 474–75; CP 53 FF 28, 56 CL 7. The court also found that Mr. Smalley was armed with a deadly weapon. CP 56 CL 7. As for witness tampering, the court found that Mr. Smalley attempted to induce Mr. Chambers to "testify falsely" based solely on the court's finding that the stabbing was intentional rather than accidental. RP 476; CP 54 FF 33, 56 CL 8. The court of appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The State presented insufficient evidence to prove the crime of witness tampering.

The State presented insufficient evidence that Mr. Smalley attempted to induce Mr. Chambers to "testify falsely," as required to prove the crime of witness tampering. Ms. Smalley had learned through a friend that Mr. Chambers told "everybody" he did not believe Mr. Smalley had stabbed him on purpose. To support his defense that the stabbing was an accident, Mr. Smalley requested that his friend ask Mr. Chambers whether he would be willing to sign a statement to that effect.

Absent any evidence that Mr. Smalley ever learned that Mr. Chambers did not truly believe the stabbing was an accident, the trial court found that Mr. Smalley attempted to induce Mr. Chambers to testify falsely. In doing so, the court effectively punished Mr. Smalley for the innocent and constitutionally protected conduct of building a defense.

In affirming the conviction, the Court of Appeals similarly applied erroneous reasoning. The Court of Appeals reasoned that because Mr. Chambers testified the assault was intentional, and because the trial court found it was intentional, Mr. Smalley engaged in witness

tampering by asking Mr. Chambers to say the stabbing was accidental. Slip Op. at 6-7. This misses the point. The point is not whether the stabbing was in fact intentional. The crucial question is what Mr. Smalley believed. Based on information he received from a friend, Mr. Smalley reasonably believed that Mr. Chambers thought the assault was accidental. Therefore, he was justified in attempting to persuade Mr. Chambers to inform the authorities to that effect.

The Court of Appeals' erroneous reasoning and its misapplication of the witness tampering statute warrant review by this Court. RAP 13.4(b)(1), (2), (4). The case also presents a significant question of constitutional law because the Court of Appeals' holding unreasonably infringes a defendant's constitutional right to acquire and present evidence relevant to his defense. RAP 13.4(b)(3).

The witness tampering statute required the State to prove (1) Mr. Chambers was a witness or was "about to be called as a witness" in an official proceeding; (2) Mr. Smalley knew or had "reason to believe" this fact; and (3) Mr. Smalley attempted to induce Mr. Chambers to "[t]estify falsely." RCW 9A.72.120(1)(a); State v. Stroh, 91 Wn.2d 580, 585–86, 588 P.2d 1182 (1979). The State bore the burden to prove these elements beyond a reasonable doubt. State v.

Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In determining whether statements to a witness or third person amount to tampering, courts consider both the "literal meaning" of the alleged words and their "inferential meaning" in context. State v. Rempel, 114 Wn.2d 77, 83–84, 785 P.2d 1134 (1990).

Mr. Smalley attempted to induce Mr. Chambers to testify by asking that he sign a notarized statement, Ex. 3 at 1–2, 18–19. But the State presented no evidence that Mr. Smalley wanted Mr. Chambers to testify "falsely." Mr. Smalley's friend, Ms. Melton, informed him that Mr. Chambers had "told everybody" that Mr. Smalley did not stab him "on purpose." Ex. 3 at 5, 8, 18; Ex. 6A, 4/7/19 at 1:10–1:19, 3:44–4:04, 9:27–9:40. Throughout the jail calls admitted by the trial court, neither Ms. Melton nor Mr. Smalley ever indicate awareness that Mr. Chambers believed Mr. Smalley stabbed him intentionally. Ex. 6A.

Courts find sufficient evidence to prove witness tampering where the defendant pressured a witness to change or recant a prior statement. For example, in State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157 (1996), the defendant asked a witness to "write a letter recanting

information that [the witness] had given the police." Id. at 622. And in State v. Williamson, 131 Wn. App. 1, 86 P.3d 1221 (2004), the defendant told a child witness that her parents "are going to jail if you don't recant your statement, take it back." Id. at 5–6; see also State v. Hurley, No. 72545-9-I, 2016 WL 785546, at *4 (Wash. App. Feb. 29, 2016) (unpub.) (defendant asked victim to "change her statement"); State v. Brown, No. 67676-8-I, 2013 WL 811740, at *3–4 (Wash. App. Mar. 4, 2013) (unpub.) (defendant wanted victim to "tell the prosecutor that she lied"); GR 14.1(a). In each of these cases, the defendant's awareness that the witness had already made a statement showed the defendant wanted the witness to tell a lie. E.g., Williamson, 131 Wn. App. at 5–6.

On the other hand, where the defendant's words cannot reasonably be understood as an attempt to prevent the witness from testifying truthfully, they do not prove witness tampering. See Rempel, 114 Wn.2d at 83–84. In Rempel, during a call from jail, the defendant apologized to the alleged victim, said the criminal case "was going to ruin his life," and asked the alleged victim to "drop the charges." Id. at 83. The defendant's "literal words," this Court reasoned, did "not contain a request to withhold testimony." Rather, they reflected the

popular misconception that a crime victim can cause a prosecution to be dismissed. Id. Nor did the surrounding context show an attempt to induce false testimony or prevent testimony altogether, as the defendant's calls did not make the victim feel threatened. Id. at 84.

Unlike in Lubers and Williamson, Mr. Smalley wanted Mr. Chambers to say no more than what, as far as Mr. Smalley knew, Mr. Chambers believed to be true: that the stabbing was an accident. Ex. 3 at 18–19. According to his "literal words," Mr. Smalley did not try to get Mr. Chambers to make a false statement. See Rempel, 114 Wn.2d at 83.

Nor does the surrounding context change the picture. In the trial court, the State argued that Mr. Smalley's growing frustration over the course of his calls with Ms. Melton showed that he attempted to induce false testimony. RP 455. But Mr. Smalley was frustrated with Ms. Melton for failing to make contact with Mr. Chambers. Ex. 3 at 41, 45, 47; Ex. 6A 4/12/19 (1) at 1:58–2:19, 4/12/19 (2) at 0:45–1:15; 4/13/19 at 0:16–0:40. Nothing in his words or tone suggests he knew Mr. Chambers had come to believe the stabbing was intentional, or that he wanted to pressure Mr. Chambers into declaring the stabbing an

accident regardless of what Mr. Chambers actually believed. See RP 455.

Nothing suggests Mr. Smalley's calls made Ms. Melton feel intimidated, threatened, or coerced, much less Mr. Chambers. Ex. 6A; see Rempel, 114 Wn.2d at 83–84 (defendant made no threats or promises; witness did not feel threatened). In fact, Mr. Smalley apparently made no calls to Ms. Melton for ten days, and when he called again, it was to get her to ask his attorney to have an investigator talk to Mr. Chambers, not to ask Mr. Chambers to sign anything. Ex. 3 at 49–50, 53; Ex. 6A 4/23/19 at 0:31–0:57, 3:11–3:51.

The State attempted to make something sinister out of Mr. Smalley's reference to an "old Denny's" in Lakewood, but context makes clear Mr. Smalley simply believed Mr. Chambers might be found there. Ex. 3 at 25, 40–41; Ex. 6A, 4/11/19 at 1:44–2:00, 4/12/19 (1) at 1:38–2:02; see RP 455. Nothing in the jail calls assigns an "inferential meaning" to Mr. Smalley's words that differs from the literal one—that Mr. Smalley wanted Mr. Chambers to say, truthfully, that the stabbing was an accident. See Rempel, 114 Wn.2d at 83–84.[2]

[2] In denying Mr. Smalley's halftime motion to dismiss, the trial court held sufficient evidence supported the charge because Mr. Smalley remarked that he did not want to be charged with witness tampering. RP

Though RCW 9A.72.120 does not include a mental element on its face, this Court has read a mental element into it where necessary to prevent it from sweeping in innocent conduct. See Stroh, 91 Wn.2d at 585–86. In Stroh, the defendant argued that the statute would violate due process unless read to require "intent to obstruct justice." Id. at 582–83. The Court rejected this argument. Id. at 583. Nonetheless, the Court held that the statute "implicitly if not expressly" requires that the defendant knew or had reason to believe the victim was a witness. Id. at 585–86. Such a requirement was necessary, the Court reasoned, to ensure that no one "innocent of the intent to obstruct justice" would be convicted, on "the assumption that the legislature did not intend to enact an unjust law." Id.

Stroh resolved whether the defendant must know that the witness is or will be a witness, but not whether RCW 9A.72.120 requires a mental state for an attempt to induce a witness to "[t]estify falsely." Thankfully, Stroh's reasoning points the way forward. This Court should grant review and hold that knowledge that the testimony

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376–77; see Ex. 3 at 7, 16; Ex. 6A, 4/7/19 at 2:55–2:58, 8:41–8:44. But Mr. Smalley's remarks show only that he knew about the crime of witness tampering; they cannot demonstrate an attempt to induce false testimony absent evidence that the testimony Mr. Smalley attempted to induce was false.

would be false is required, because otherwise the statute would punish innocent, and constitutionally protected, conduct. Stroh, 91 Wn.2d at 585–86.

The due process clauses guarantee a defendant's right to present a defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This includes the right to seek evidence and witnesses that support the accused's "version of the facts." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). If the accused were guilty of witness tampering every time a witness's desired testimony turned out to be untrue, regardless of what the defendant knew when asking the witness to testify, the right to present evidence in defense would be unreasonably hobbled. A requirement of knowledge that the sought testimony is false is necessary to prevent RCW 9A.72.120 from punishing this innocent conduct and becoming an "unjust law." See Stroh, 91 Wn.2d at 585–86.

In addition, the statute's use of the word "attempt" implies legislative intent to require knowledge of the testimony's falsity. RCW 9A.72.120. By definition, an "attempt" to do something is an act carried out with intent to achieve that end. Attempt, Black's Law

Dictionary (11th ed. 2019). Consistent with this principle, the crime of attempt requires "intent to commit" the underlying crime attempted. RCW 9A.28.020(1); see Williamson, 131 Wn. App. at 6 (likening witness tampering to the crime of attempt). By proscribing an "attempt" to induce false testimony, the Legislature signaled its intent to require at least that the defendant knew the testimony would be false.

Here, the trial court found Mr. Smalley "attempt[ed] to induce Mr. Chambers to testify falsely" based solely on its finding that the stabbing was intentional rather than accidental. RP 476; CP 54 FF 33. The court entered no findings concerning whether Mr. Smalley knew that Mr. Chambers believed the stabbing was not an accident. Id. The Court of Appeals made a similar error, holding that Mr. Smalley was guilty of witness tampering because Mr. Chambers testified and the trial court found that the stabbing was intentional. Slip Op. at 6-7.

This Court should grant review and correct the lower courts' fundamental errors. Unless Mr. Smalley knew Mr. Chambers would be lying if he signed the desired statement, a guilty verdict punishes Mr. Smalley for the innocent act of seeking evidence to support his defense that the stabbing was accidental. The Legislature cannot have intended this result. See Stroh, 91 Wn.2d at 585–86.

2. The information omitted an essential element of first degree assault.

The Court of Appeals held that "unlawful force" is not an essential element of the crime of first-degree assault that must be included in the information. Slip Op. at 9-10. This holding is contrary to this Court's understanding of what is an essential element. Review is therefore warranted. RAP 13.4(b)(1), (4).

It is fundamental that "[a]ccused persons have the constitutional right to know the charges against them." State v. Pry, 194 Wn.2d 745, 751, 452 P.3d 536 (2019); U.S. Const. amend. VI; Const. art. I, § 22. The charging document must "adequately identify[]" each offense charged and allege facts supporting each essential element. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (quoting State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). This "essential element rule" ensures that the defendant receives notice of what the State intends to prove and permits the preparation of a defense. Pry, 194 Wn.2d at 752 (citing State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). The remedy for a deficient information is dismissal without prejudice. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

An essential element is any fact that must be proved "to establish the very illegality" of the charged conduct. Pry, 194 Wn.2d at 752 (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

Count I of the information charged Mr. Smalley with first-degree assault. CP 6. The trial court found Mr. Smalley guilty of second-degree assault, an inferior degree of first-degree assault. CP 53 FF 28, 56 CL 7.

Regardless of the degree, assault requires the use of "unlawful force." State v. Prado, 144 Wn. App. 227, 246–47, 181 P.3d 901 (2008) (citing State v. Hupe, 50 Wn. App. 277, 748 P.2d 263 (1988)). This requirement excludes circumstances where force was used lawfully, such as in self-defense. Cf. WPIC 35.50 (note on use) (instructions should include "with unlawful force" where "there is a claim of self-defense or other lawful use of force"). Because use of force may be lawful in some circumstances, an allegation of "unlawful force" is needed to establish the "illegality" of the alleged assault. Pry, 194 Wn.2d at 752.

Count I alleges Mr. Smalley assaulted Mr. Chambers, but not that he did so using "unlawful force." CP 6. As a result, the information

would not notify a common-sense reader that the charged offense excluded lawful uses of force. See State v. Sullivan, 196 Wn. App. 314, 323, 382 P.3d 736 (2016) (information must be read using "common sense"). Because Count I excludes an essential element of assault in the second degree, the assault conviction must be reversed and the charge dismissed without prejudice. See State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 10th day of June, 2021.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID EDWARD SMALLEY, Appellant.	No. 54348-6-II UNPUBLISHED OPINION

MAXA, J. – David Smalley appeals his convictions for second degree assault, possession of a controlled substance (methamphetamine), and witness tampering as well as the imposition of community custody supervision fees as a legal financial obligation (LFO). The convictions arose from an incident in which Smalley stabbed an acquaintance, and then in telephone calls from jail attempted to have a third person convince the victim to sign a statement that the stabbing was accidental.

We hold that (1) sufficient evidence supports Smalley's witness tampering conviction, (2) the amended information provided sufficient notice of the assault charge, and (3) Smalley's unlawful possession of a controlled substance must be vacated under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Accordingly, we affirm Smalley's assault and witness tampering

convictions, reverse his unlawful possession of a controlled substance conviction, and remand for the trial court to vacate that conviction and for resentencing.[1]

FACTS

Incident and Investigation

Smalley and Chambers were acquaintances. On March 5, 2019, Chambers visited Smalley in Smalley's garage with others present. Smalley gave Chambers money and methamphetamine. Smalley then made a statement to which Chambers took offense. Chambers responded with a rude comment.

Embarrassed by Chambers' comment, Smalley approached Chambers and stabbed him in the abdomen with a knife. The stab wound penetrated all three layers of Chambers' abdominal wall and potentially was life-threatening. Chambers underwent exploratory surgery to ensure that there was no internal damage, and the wound was repaired.

Officer Noah Dier from the Lakewood Police Department investigated the incident and spoke with Chambers about his injury. On two separate occasions, Chambers told him that he had been stabbed by a person named Tony. After Chambers underwent surgery, Dier spoke to him a third time about the incident. On this occasion, Chambers told Dier that Smalley had stabbed him at Smalley's residence.

Lakewood Police obtained a search warrant for Smalley's residence. Officers executed the search warrant and arrested Smalley. In a search of Smalley incident to arrest, officers found a bag of methamphetamine in Smalley's jacket.

[1] Smalley also challenges the imposition of community custody supervision fees as a legal financial obligation. Because we are remanding for resentencing, we do not address this issue.

Telephone Calls from Jail

While in jail, Smalley made several telephone calls to a friend, McKenna Melton. Sergeant Sean Conlon listened to the calls and they also were recorded. In these calls, Smalley attempted to have Melton contact Chambers for the purpose of having Chambers write and sign a statement that the stabbing was an accident.

Charging Information

The State filed an amended information charging Smalley with first degree assault, witness tampering, and unlawful possession of a controlled substance (methamphetamine). Smalley did not object to the information.

Bench Trial

Smalley waived a jury trial and was tried by the court. At trial, Chambers acknowledged that he gave three different statements to law enforcement as to the circumstances of his stabbing. Chambers stated that he intended to return to Smalley's home to exact revenge himself, so he initially withheld the truth in an attempt to throw law enforcement off. Chambers testified that he had a change of heart and decided to identify Smalley after undergoing surgery. Chambers then told Dier that Smalley had stabbed him.

Chambers testified at trial that Smalley stabbed him intentionally. In addition, Chambers testified that he never told anyone that the stabbing was an accident. The trial court found Chambers' testimony credible.

During Conlon's testimony, the State introduced an audio recording and written transcript of phone calls Smalley made from jail to Melton. Conlon testified that, throughout the course of these phone calls, Smalley attempted to get Melton to locate Chambers and get him to sign an agreement that the stabbing was an accident.

At the end of the trial, the trial court gave an oral ruling finding Smalley guilty of second degree assault as an inferior degree offense to the charge of first degree assault, possession of a controlled substance (methamphetamine), and witness tampering. The trial court later entered detailed findings of fact and conclusions of law supporting the guilty verdicts. The findings incorporated the exhibits admitted into evidence, and the court's oral ruling.

The trial court made express findings of fact that Smalley intentionally assaulted Chambers with a deadly weapon. The court also made conclusions of law that the assault was intentional. In addition, the court made a finding that Smalley's calls to McKenna constituted an attempt to induce Chambers to testify falsely. And the court made a conclusion of law that Smalley attempted to induce Chambers to testify falsely.

At sentencing, the trial court determined that Smalley's offender score for each conviction was 3, based on the two other current offenses and one prior unlawful possession of a controlled substance conviction.

Smalley appeals his convictions.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Smalley argues that the evidence was insufficient to prove that he committed witness tampering. Specifically, he claims that the State proved only that he had attempted to induce Chambers to testify, not that he attempted to induce Chambers to testify *falsely*. We disagree.

1. Standard of Review

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017).

In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id*. at 265-66. Credibility determinations are made by the trier of fact and are not subject to review. *Id*. at 266. Circumstantial and direct evidence are equally reliable. *Id*.

We treat unchallenged findings of fact as verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Here, Smalley assigned error to only one finding of fact – that he attempted to induce Chambers to testify falsely. Therefore, the court's other findings are verities.

2. Witness Tampering

RCW 9A.72.120(1)(a) states that a person is guilty of witness tampering "if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness . . . to: (a) [t]estify falsely." In assessing whether the defendant tampered with a witness, the trier of fact can consider both "the literal meaning of the words used" and "the inferential meaning of the words and the context in which they were used." *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

3. Analysis

Smalley concedes that he was trying to induce Chambers to testify. The question is whether there was sufficient evidence to prove that he asked Chambers to testify *falsely*.

Smalley argues that under RCW 9A.72.120(1)(a), the State must prove that the defendant knew that the witness did not believe the testimony that the defendant was trying to induce. In other words, a defendant must know that the witness would be lying if he or she provided the requested testimony. According to Smalley, the fact that the testimony ultimately turns out to be

false should not matter. Otherwise, a defendant's right to present a defense would be thwarted. A defendant must be allowed to contact witnesses to see if they will agree to provide testimony that will support the defendant's version of the facts.

Relying on this interpretation of the law, Smalley argues that there is no evidence that he knew that Chambers did not believe that the stabbing was accidental and that saying that it was accidental would be false. Smalley claims that he merely wanted Chambers to sign a statement confirming what he allegedly had told others: that the stabbing was an accident. He asserts that he had no reason to know that Chambers believed the stabbing was intentional. And Smalley thought that the stabbing was an accident. Therefore, Smalley was asking Chambers to truthfully state what both he and Chambers believed to be true. Smalley contends that neither his literal words nor their inferential meaning suggested otherwise.

Even assuming Smalley's legal interpretation of RCW 9A.72.120(1)(a) is correct, we reject Smalley's argument for three reasons. First, Smalley's argument depends on his testimony that Melton informed him that Chambers had told others that the stabbing was accidental. However, Chambers testified that Smalley intentionally stabbed him. And Chambers expressly testified that he never told anyone that the stabbing was an accident. The trial court found that Chambers was a credible witness. The court was free to credit Chambers' testimony on this issue and disregard Smalley's testimony. This court does not review the factfinder's credibility determinations. *Cardenas-Flores*, 189 Wn.2d at 266.

Second, there is evidence in the transcripts of the telephone calls from which the court could infer that Smalley knew that Chambers believed that the stabbing was intentional. Referring to Chambers, Smalley stated, "He lied twice. . . . You know, he covered (inaudible) good for me." Ex. 3 at 33. In commenting on Chambers' multiple statements to law

enforcement, Smalley stated that Chambers' lies initially had "gained a cover for me" because they indicated that someone else had been responsible for the stabbing. Ex. 3 at 33. Then Smalley stated, "You know, I did it." Ex. 3 at 33.

Third, the trial court made unchallenged findings of fact that Smalley intentionally stabbed Chambers. Those findings are verities on appeal. *Homan*, 181 Wn.2d at 106. Therefore, the court could infer that Smalley knew that the stabbing was not an accident and that he was attempting to induce Chambers to testify falsely to a fact that Smalley knew was false.

We conclude that sufficient evidence supports Smalley's witness tampering conviction. Accordingly, we affirm that conviction.

B. SUFFICIENCY OF INFORMATION

Smalley argues that the information provided insufficient notice of the assault charge because it omitted an "unlawful force" element. We disagree.

1. Legal Principles

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, "[a]ccused persons have the constitutional right to know the charges against them." *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019). The State gives notice of criminal charges in an information, which "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1); *see State v. Porter*, 186 Wn.2d 85, 89, 375 P.3d 664 (2016).

To be constitutionally sufficient, an information must state "every essential statutory and nonstatutory element of the crime." *Pry*, 194 Wn.2d at 751. An essential element is one that must be specified to establish the illegality of the charged behavior. *Id.* at 752. If the

information fails to allege every essential element, it is insufficient and the charge must be dismissed without prejudice. *Porter*, 186 Wn.2d at 89-90.

However, the information is not required to provide definitions of essential elements. *Pry*, 194 Wn.2d at 752. Definitions of terms within an essential element are not themselves essential elements. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014).

When the defendant challenges the sufficiency of the information for the first time on appeal, as here, this court liberally construes the document in favor of its validity. *Pry*, 194 Wn.2d at 752. This court determines based on a liberal reading whether the information in some manner contains all the essential elements. *Id.*

We review de novo allegations of constitutional violations, such as the insufficiency of an information. *See Johnson*, 180 Wn.2d at 300.

2. Analysis

Smalley argues that an essential element of first degree assault is that the assault was carried out with "unlawful force." He contends that the amended information was insufficient because it did not allege this element. We disagree.

The State charged Smalley with first degree assault under RCW 9A.36.011(1)(a)[2], which means assaulting another "with intent to inflict great bodily harm . . . with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."

One of the essential elements of first degree assault is an "assault." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Because the criminal code does not define the term

[2] RCW 9A.36.011has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

"assault," courts apply the common law definition. *Id*. Three definitions of assault are recognized: "(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." *Id*. at 215.

Smalley claims that regardless of degree, an assault requires the use of unlawful force, citing *State v. Prado*, 144 Wn. App. 227, 181 P.3d 901 (2008). But *Prado* involved the adequacy of a jury instruction defining assault, not the sufficiency of an information. *Id.* at 245-47. The court noted that the pattern jury instruction on the definition of assault included "unlawful force" as a bracketed phrase. *Id.* at 246; *see* 11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL § 35.50 (4th ed. 2016) (WPIC).[3]

However, the court noted that the bracketed phrase may only be appropriate if there is evidence of self-defense or other lawful force. *Prado*, 144 Wn. App. at 246-47. The Note on Use for WPIC 35.50 states, "Include the phrase 'with unlawful force' if there is a claim of self-defense or other lawful use of force." *Prado* was a self-defense case. 144 Wn. App. at 247; *see also State v. Brooks*, 142 Wn. App. 842, 846-47, 176 P.3d 549 (2008) (holding that inclusion of the term "unlawful force" in a second degree assault instruction was not required because the defendant did not claim self-defense).

In any event, whether unlawful force must be included in a jury instruction is a much different issue than whether that term must be included in an information. The fact that unlawful force may be part of the definition of assault under certain circumstances does not make unlawful force an essential element. As noted above, the information is not required to provide

[3] Prado cited to the version of WPIC 35.50 in the 2005 second edition supplement. *Prado*, 144 Wn. App. at 246.

definitions of essential elements because definitions are not themselves essential elements. *Pry*, 194 Wn.2d at 752; *Johnson*, 180 Wn.2d at 302.

Further, the Supreme Court has stated in an alternative means case that the common law definitions of assault do not constitute essential elements of the offense. *State v. Smith*, 159 Wn.2d 778, 788, 154 P.3d 873 (2007). Rather, they merely define an element of the crime charged: the element of assault. *Id.* at 787.

We reject Smalley's argument that the information was insufficient with respect to the first degree assault charge.

C. UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE CONVICTION

Smalley challenges his unlawful possession of a controlled substance conviction following the Supreme Court's decision in *Blake*. The State concedes that Smalley's conviction must be vacated. We reverse and remand for the trial court to vacate Smalley's conviction and for resentencing.

In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, RCW 69.50.4013(1), violates state and federal due process clauses and therefore is void. 197 Wn.2d at 195. As a result, any conviction based on that statute is invalid. *See In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004) (a judgment and sentence is invalid on its face when a defendant is convicted of a nonexistent crime). And a conviction based on an unconstitutional statute must be vacated. *See Blake*, 197 Wn.2d at 195; *State v. Carnahan*, 130 Wn. App. 159, 164, 122 P.3d 187 (2005) (vacating a conviction that was based on a statute that the Supreme Court held was unconstitutional). Therefore, Smalley's conviction for unlawful possession of a controlled substance must be vacated.

In addition, a conviction based on an unconstitutional statute cannot be considered in calculating the offender score. *See State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). Therefore, Smalley's offender score must be amended to not include the vacated conviction and his prior unlawful possession of a controlled substance conviction.

Finally, without the two unlawful possession of a controlled substance convictions, Smalley's offender score will be 1 instead of 3. Therefore, Smalley is entitled to be resentenced.

CONCLUSION

We affirm Smalley's assault and witness tampering convictions, reverse his unlawful possession of a controlled substance conviction, and remand for the trial court to vacate that conviction and for resentencing.

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

Maxa, J.
MAXA, J.

We concur:

Glasgow, ACJ
GLASGOW, A.C.J.

Cruser, J.
CRUSER, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54348-6-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: June 9, 2021
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