NO. 443236 - III

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CHARLES LONGSHORE, Appellant,

SUPPLEMENTAL BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

On March 25, 2012, Charles Longshore was arrested for and later charged with charged with Felony Harassment, Eluding a Police Vehicle, and Possession of a Controlled Substance. CP 99-101, 112-14.

Felony Harassment. On March 25, 2012, Charles Longshore went to visit an acquaintance at the Firwood Gardens apartments in Shelton, Washington. He had borrowed a friend's car that day, a Dodge Intrepid, which belonged to and was registered to another local resident. RP 184. Mr. Longshore had two friends with him at the time. Meanwhile, two residents, Justin Elston and Judith Aldridge, saw Mr. Longshore arrive at the apartment complex. Without any apparent evidence to support the claim, Elston and Aldridge believed that Mr. Longshore had been involved in a string of robberies at the Firwood Gardens apartments. Rather than immediately reporting their suspicions to police, Elston and Aldrige decided to take matters into their own hands and conduct their own "investigation."

Seeing that Mr. Longshore and his companions were about to leave the parking lot, Elston parked his directly behind the Dodge. Eston admitted that he did this in order to box in the Dodge and its passengers so as to prevent them from leaving. RP 41, 43.

Aldridge would later confirm that Elston's sole purpose for parking his car there was to "block Charles in[.]" RP 69-70. Mr. Longshore got out of the car to tell Elston to move. Elston immediately accused Mr. Longshore or the unsolved crimes. Mr. Longshore denied the accusations and there is no evidence that Mr. Longshore was ever charged in these alleged crimes. The two men argued but Elston was still unwilling to move his truck. RP 69-70, 129. At some point after blocking the Dodge, Elston called police, but he still refused to move his truck.

Eventually, Mr. Longshore had enough of these false accusations and of Elston's attempt to perform a citizen's arrest without any apparent evidence. Mr. Longshore was certainly upset. But, rather than physically hurt Elston, Mr. Longshore decided to try to frighten him into moving the truck. To do that, Mr. Longshore lied to Elston. Mr. Longshore told Elston that he had a gun in the car (which was untrue) and that he was going to get it and shoot Elston if he did not move his truck. RP 43. The ruse worked. Elston finally moved his car and allowed Mr. Longshore and his companions to leave. RP 43. Mr. Longshore immediately jumped into the driver's seat drove away. RP 43.

Eluding. According to Pena, after leaving the Firwood Apartments, the group briefly stopped to pick up another friend, Ty Cuzick, who was located at a local store called Tozier's. Cuzick told

Charles that he had wanted to use the car. When they arrived at Tozier's to pick up Cuzick, Cuzick took the wheel of the car and would remain driving until after the impending high-speed chase. RP 281, 287-90. Mr. Longshore moved to the front passenger seat. Cuzick had intended to drop off the passengers at a mutual friend's house, but when they arrived, the friend was not home. They left the friend's house, but soon found themselves in a high-speed police chase. RP 294.

Meanwhile, Officer Daniel Patton responded to reports of the earlier disturbance at the Firwood Apartments to investigate Elston's earlier complaint. When arrived, however, Officer Patton learned over the radio that the Dodge was no longer there. Another law enforcement vehicle had apparently found the Dodge near Olympic Highway South and had unsuccessfully tried to pull the Dodge over. RP 128-31. Officer Patton left the apartments to search for the Dodge. He eventually spotted the Dodge in an area near Lake Boulevard. He turned on his lights and sirens and tried to stop the vehicle, again with no success. Officer Patton thought that he saw Charles Longshore (whom he had encountered before) driving the vehicle. He said that the driver was wearing a dark-colored jacket with a hood. RP 133-42.

Patton had a general hunch that Mr. Longshore was driving, even though his opportunity to see the driver's face was very limited. He

testified that he became confident in his identification only after he overheard an unsubstantiated report over his radio that the driver of the car was Mr. Longshore. RP 212.

Mason County Sheriff's Office Deputy Trevor Clark also claimed to have identified Mr. Longshore as the driver. This identification was made while driving, through the driver's side side-view mirror. The windows of the Intrepid were heavily tinted. In fact, seeing through these tinted windows was so difficult that when officers later approached the vehicle after the chase was over, they were unable to determine if *anyone* was inside, from only *a few feet away*. RP 261. Deputy Clark could not provide any details to substantiate his purported identification. He could not remember what type of clothing the driver was wearing, the style of the driver's hair, nor whether there were any other passengers inside the vehicle. RP 217-25, 230, 236, 238-50.

Just before the chase came to an end, police had completely lost sight of the Dodge for a period of at least two minutes. RP 228. The chase ultimately ended when the driver lost control of the vehicle in a grassy rural area, where the Dodge was immobilized. RP 154, 221-22. After locating the vehicle, only three passengers remained at the scene, including Mr. Longshore. Although he certainly had time to flee the scene, he stayed behind to speak with police. The responding officers questioned

Mr. Longshore and accused him of eluding police. He denied the accusation numerous times, telling them that Mr. Cuzick was driving and had just fled on foot. Officer Patton noticed that Mr. Longshore was sitting outside of the dodge, when he arrived. Mr. Longshore adamantly denied that he had been driving the car when it successfully eluded the pursuing police vehicles. RP 345-73. Mr. Longshore was wearing a white shirt when he was arrested. RP 189. Officers investigated the nearby scene. They located a black jacket on the ground by a nearby shed, but could not locate any other suspects. RP 189-90, RP 258.

Despite Mr. Longshore's complaints and the testimony of other witnesses that corroborated his story, law enforcement never once attempted to contact Mr. Cuzick. RP 259. The two primary officers involved in the investigation, Deputy Cotte and Officer Patton, admitted that they ignored several different leads that indicated that Mr. Longshore was not the driver of the car when it eluded police. RP 229-230; RP 216. Deputy Patton testified that he did not believe that Cuzick was driving because he instead believed the unsubstantiated and uncorroborated radio reports during the chase that had summarily assumed Mr. Longshore was driving. RP 229-230. Worse yet, Officer Patton admitted that during his investigation, he had several leads indicating that Mr. Longshore had not

actually been driving the vehicle, but he did not follow up on those leads. RP 216.

After interviewing Mr. Longshore and the two female passengers, the responding officers did not appear to attempt to locate any other possible eye-witnesses. Yet, soon before trial, Glenn Probst, was located as a witnesses to the chase and testified as to the facts of the chase and its abrupt ending. Mr. Probst resides on a hill near Taylor Road, where Longshore was apprehended. Mr. Probst testified that the Dodge had come to a stop near the chicken house area of the field visible from his home. RP 345-49. Mr. Probst watched as the driver exited the Dodge and fled the scene of the crash, running through the field and jumping over a nearby fence, before he disappeared behind a nearby building. RP 353-56. He was wearing a dark colored jacket that matched the description of the jacket found be the she nearby shed. RP 189-90, RP 258.

Then, Mr. Probst testified that a male in a white t-shirt exited the right front passenger side door, along with two other passengers, who appeared to be female, who exited the car from the back doors. RP 355-56. Mr. Probst watched as these three persons were then detained by the multiple law enforcement officers who had arrived on the scene; the white-shirted front seat passenger was placed in handcuffs at the side of the Dodge. RP 359-60.

Ty Cuzick testified. He openly admitted that he had briefly owned the Dodge. RP 337-38. Cuzick also admitted to having knowledge of the facts of the chase. RP 342. Yet, unsurprisingly, Cuzick denied that he had any involvement the charged crime. RP 337. He claimed that he was not the driver of the Intrepid and claimed that he was not even in the car when the chase occurred. He claimed that he only knew about the facts of the chase because he was coincidentally listening to his police scanner radio when the chase occurred. RP 342.

Possession of the Pipe. At the scene of the arrest, Officer Patton located a pipe in the rear passenger compartment of the Dodge, where the two female passengers had been seated. The pipe was found wrapped up inside a colorful "footie" type sock. RP 203-05; Exhibit 11 (photo of sock). The pipe contained residue which was tested and found to contain methamphetamine. RP 157-63; RP 204. The dodge did not belong to Mr. Longshore, it was registered to someone else and Cuzick had admitted to owning the Dodge at one point. Mr. Longshore's finger prints were not on the pipe or the sock and there was no evidence that Mr. Lonshore had ingested methamphetamine on the day in question.

A jury convicted Mr. Longshore on all counts. Mr. Longshore appealed. Mr. Longshore filed his direct appeal. This PRP is intended to supplement that appeal.

IV. AUTHORITY AND ARGUMENT

A. "WITHOUT LAWFUL AUTHORITY" IS AN ELEMENT OF FELONY HARASSMENT, NOT AN AFFIRMATIVE DEFENSE. AS SUCH AN ELEMENT, DUE PROCESS REQUIRES THE STATE PROVE THAT ELEMENT BEYOND A REASONABLE DOUBT.

The Fourteenth Amendment prohibits a State from convicting any defendant unless the prosecution has proved beyond a reasonable doubt every element of the crime charged.[1] For Due Process purposes, an "element" is refers to any "fact" that the State must prove to establish or "increase the prescribed range of penalties to which a criminal defendant is exposed."[2] Where a fact, if proved would only "excuse conduct that would otherwise be punishable," but that fact "does not controvert any of the elements of the offense itself," Due Process does not require the State to disprove that fact beyond a reasonable doubt.[3]

Our Legislature has made "without lawful force" an express element of the crime of harassment.[4] The text of the harassment statute makes this unmistakably clear.[5] The Legislature constructed the statute in

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[1] *In re Winship*, 397 U.S. 358, 360-61 (1970).
[2] *United States v. O'Brien*, 560 U.S. 218, 130 S. Ct. 2169, 2174, 176 L. Ed. 2d 979 (2010).
[3] *State v. Lynch*, 2013 Wash. LEXIS 764, 14-15, 2013 WL 5310164 (2013) (McCloud Concurring); (citing *Smith v. United States*, ___ U.S. ___, 133 S. Ct. 719, 184 L. Ed. 2d 570 (2013) (citing *Dixon v. United States*, 548 U.S. 1, 6 (2006)).
[4] Under RCW 9A.46.020, a person commits the crime of felony harassment if (1) the defendant threatens to kill the victim, (2) the threat is done knowingly, (3) the threat is done "*without lawful authority*," (3) the threat places the victim in reasonable fear that the threat will be carried out.
[5] RCW 9A.46.020 (1) (a).

this way, at least in part, because it wished to avoid criminalizing expressions of speech that have been notoriously defended as non-criminal, such as those protected by the First Amendment.[6] The State therefore must prove that element (the burden of proof). The "State may not burden a defendant with disproving an element of the crime charged."[7] As newly minted Justice McCloud recently recognized, "to do so [would be unconstitutional because it] would be to presume the existence of a fact necessary for conviction."[8]

There are two exceptions to this rule under which the State need not prove a particular fact beyond a reasonable doubt: (1) when the fact is considered a sentencing factor, and (2) when the Legislature has clearly made that fact an affirmative defense, which the defendant has to prove beyond a reasonable doubt. Neither apply here.

First, the requirement that the defendant act "without lawful authority" is clearly not a "sentencing factor," which may be found without a jury finding because a defendant who makes a threat under *lawful authority* will not be subject to *any* criminal liability under the

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[6] *Id.*
[7] *State v. Lynch*, 2013 Wash. LEXIS 764, 14-15, 2013 WL 5310164 (2013) (McCloud Concurring)
[8] *State v. Lynch*, 2013 Wash. LEXIS 764, 14-15, 2013 WL 5310164 (2013) (McCloud Concurring)

harassment statute.[9] By placing the term unlawful authority *before* the definition of the offense itself, the Legislature clearly expressed its desire to criminalize some threats while protecting others.[10]

Second, "without lawful authority" is likewise not an affirmative defense, which the defendant would have to prove by a preponderance. An affirmative defense is one which excuses conduct that is otherwise unlawful. [11] Yet, our Legislature has specifically made self-defense and its related defenses "lawful." Moreover, the Legislature has not only specifically included the phrase "without lawful authority" in the text of the harassment statute, it has also announced that a person who acts "*with* lawful authority" cannot be punished for that crime. To do so would be to presume the existence of a fact necessary for conviction.

In the traditional self-defense context, the prosecution need not always disprove lawful authority, which is often comprised of "negative propositions which may not be involved in each case."[12] However, "once the issue . . . is properly raised, however, the absence of self-defense becomes another element of the offense which the State must prove

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[9] RCW 9A.46.020 (1) (a).
[10] *State v. J.M.,* 144 Wn.2d 472, 477, 28 P.3d 720 (2001).
[11] *State v. Lynch,* 2013 Wash. LEXIS 764, 14-15, 2013 WL 5310164 (2013) (McCloud Concurring); (citing *Mullaney v. Wilbur*, 421 U.S. 684, 699, 704 (1975)).
[12] *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

beyond a reasonable doubt."[13] To properly raise the issue, the Legislature "has not clearly imposed the burden of proving self-defense on criminal defendants."[14] Accordingly, whenever the defendant's arguments and facts raise an issue as to the lawfulness of the defendant's actions, "the obligation to prove the absence of self-defense remains at all times with the prosecution.[15]

Proving that Mr. Longshore threatened Elston without lawful authority is, therefore, an essential element of the crime of felony harassment. Because it is an element of the crime, Due Process requires the State to bear the burden of proving that element, especially here because there was certainly evidence that the threat was made lawfully. Although Mr. Longshore did not request an instruction defining "lawful authority", the State was constitutionally mandated to disprove the lawfulness of Longshore's actions beyond a reasonable doubt. Instead, the prosecution failed to adequately define "lawful authority" and treated Longshore's threats as per se unlawful even when Longshore 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.

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[13] *Id.*
[14] *Id.*
[15] *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

B. EVEN IF "WITHOUT LAWFUL FORCE" WAS NOT TYPICALLY AN ELEMENT OF UNLAWFUL HARASSMENT, UNDER THE LAW OF THE CASE DOCTRINE, THE STATE ASSUMED THE BURDEN OF PROVING THAT MR. LONGSHORE ACTED "WITHOUT LAWFUL FORCE" WHEN IT FAILED TO OBJECT TO ITS INCLUSION IN THE JURY INSTRUCTIONS.

Under the law of the case doctrine, jury instructions not objected to become "the law of the case."[16] In a criminal trial, the doctrine requires that every element contained in the "to convict" instruction(s) be proved by the State beyond a reasonable doubt, including any additional element not defined as an essential element of the crime, if no objection to it is raised by the State.[17] Thus, when unnecessary elements of an offense are included without objection in the "to convict" instruction, the State assumes the burden of proving those otherwise unnecessary elements.[18] In such a case, whether the evidence is sufficient to sustain the verdict is determined by the law as it is set forth in the instructions.[19]

Here, the court failed to narrowly define the term "lawful authority" so that it fit the particular facts of this case. The phrase "unlawful force" must be included in the definitional instruction "if there

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[16] *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).
[16] *Id.* at 105.
[17] *See State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (because the State failed to object to jury instructions they are the law of the case and the court will consider error predicated on them).
[18] *Hickman*, 135 Wn.2d 97, 101-02
[19] *Hickman*, 135 Wn.2d 97, 101-02

is a claim of self-defense or other lawful use of force."[20] That phrase, however, has been interpreted to mean "authority found in 'easily ascertainable sources' of statutory or common law."[21] Even though it is easily ascertainable though, the jury should not be forced to go find the meaning on their own or to speculate as to its meaning. For this reason, the comments to the WPIC's always recommend either defining the phrase with a specific statute, or leaving the phrase out altogether.[22]

Here, the Court failed to narrowly define the term, as recommended by the comments to the applicable WPICs. Instead, it provided the jury with a circular definition of "lawful authority" in a so-called "definitional" instruction, specifically Instruction 14. That instruction defines lawful authority as follows: "[a] person acts without lawful authority when that person's acts are not authorized by law." This definition of "lawful authority" was clearly circular and not of help to the jury. Yet, because the State failed to object to the proposed instruction, the broad definition of "not authorized by law" became the law of the case.

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[20] *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal § 35.50, at 547-48 (3d ed. 2008).
[21] *State v. Lee*, 82 Wn.App. 298, 303, 917 P.2d 159 (1996), affirmed at 135 Wn.2d 369, 957 P.2d 741 (1998), citing *State v. Smith*, 111 Wn.2d 1, 11, 759 P.2d 372 (1988).
[22] *See, e.g.,* WPIC 36.27 ("When the evidence supports defendant's claim of lawful authority, an instruction defining the term should be given so that the jury is not left to speculate on its meaning. The committee has not offered a particularized definition because of the wide variety of claims of lawful authority that might be made. It is suggested that an instruction specifically defining the case-specific claim be drafted and used instead of WPIC 36.27. ").

The State, therefore, assumed the burden to prove this broad definition of "without lawful authority."

C. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. LONGSHORE HARASSED ELSTON AND ALDRIDGE, BECAUSE THE STATE FAILED TO PROVE THAT LONGSHORE ACTED "WITHOUT LAWFUL AUTHORITY."

1. STANDARD OF REVIEW.

Evidence of a crime must be sufficient to allow a rational jury to reasonably conclude that all elements of the crime charged have been proved beyond a reasonable doubt.[23] Upon review, the court views the evidence in the light most favorable to the State.[24] If some evidence supports an element, but some does not, the evidence is sufficient to prove that element (i.e. "conflicting evidence"). But, evidence fails to establish the facts required to prove that element, reversal is required, and retrial is prohibited.[25] The case must be dismissed.[26]

2. ELSTON AND THE ALDRIDGES, THE SO-CALLED "VICTIMS" OF THE HARASSMENT CHARGE IN THIS CASE, COULD HAVE EASILY BEEN CHARGED WITH UNLAWFUL IMPRISONMENT.

A person commits unlawful imprisonment when he unlawfully "restrains" someone.[27] A person is "restrained" if someone substantially interferes with his liberty without the victim's consent and without legal

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[23] *Id.*
[24] *Id.*
[25] *Id*
[26] *Id.*
[27] RCW 9A.40.040

authority.[28] A victim's lack of consent is established even if the restraint is accomplished without any physical force; mere intimidation is sufficient.[29] If, for instance, a victim locked in his own room by someone without lawful authority to do so, he is a victim of unlawful imprisonment.[30] In fact, the door does not even need to be locked or even shut to justify a conviction: evidence that a person "stood in the door and would not let [the victim] leave" the room is sufficient to support a charge and conviction for unlawful imprisonment.[31]

Justin Elston, at the direction of Charles and Judith Aldridge, intentionally parked his truck behind Mr. Longshore's vehicle and blocked Mr. Longshore from leaving the area. Elston and the Aldridge's accused Mr. Longshore of committing a string of robberies which had occurred recently at the apartment complex and refused to allow Longshore or any of his companions to leave the premises.

On these facts, Eston and both the Aldridges could have been charged with unlawful imprisonment.[32] By blocking in the vehicle, Elston substantially restricted Longshore's ability to leave the apartment

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[28] RCW 9A.40.010
[29] *Id.*
[30] *State v. Thomas*, 35 Wn. App. 598, 603, 668 P.2d 1294 (1983) ("it would be possible to restrain someone (by locking a door) without taking him anywhere").
[31] *State v. Allen*, 116 Wn. App. 454, 465-466, 66 P.3d 653 (2003).
[32] A person is guilty of unlawful imprisonment if he or she knowingly restrains another person. RCW 9A.40.040.

complex. Longshore did not consent to the restraint. Further, Mr. Longshore did not provoke the restraint. Quite the opposite. Elston provoked the conflict when he blocked Mr. Longshore in.

3. A Person May not be Convicted of Harassment if he Threats to Use Force to Defend himself or Others from an Unlawful Imprisonment because Doing so is a "Lawful [use of] Force."

Under RCW 9A.16.020, a defendant may use non-lethal force to prevent any "offense against a person."[33] Unlawful imprisonment is a crime against person.[34] Therefore, if a defendant reasonably believes that he has been unlawfully imprisoned, he may use reasonable force if it is necessary to combat the unlawful imprisonment.[35]

In fact, because unlawful imprisonment is a felony, a defendant may, under some circumstances, use lethal force to prevent a crime against

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[33] RCW 9A.16.020

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
> ...
> (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*
> Similarly, a defendant may use lethal force either (1) to prevent a felony or great personal injury or (2) when committed in the course of resisting the commission of a felony. 9A.16.050(2) (force is lawful when "In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is."

[34] RCW 9.94A.411

[35] RCW 9A.16.020

his person. Likewise, an individual acts with lawful authority when he uses force in defense of another person, so long as he reasonably believes that the third person is an innocent party and that the aggressor has placed that person in danger.[36]

It is possible that the State will argue that Mr. Longshore's threat to kill is not lawful because he did not actually use force as is required in the typical self-defense case. This argument would lack merit. Both the plain language of the assault statute and the policy concerns of the self-defense statute would require the court to give a defense of property instruction on request. Under such a reasoning, the Court would allow Mr. Longshore to punch someone in the face and break their nose (non-deadly force), but it would not allow him to merely threaten to use force, causing absolutely no injury whatsoever.

In *State v. Arth*, the defendant was convicted of Malicious Mischief after he punched and kicked the Savelli's (the victim) vehicle in Renton, Washington.[37] The victim pulled into the gas station first and parked his car. The car blocked Arth from entering the gas station parking lot. He entered through another entrance.

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[36] *State v. Bernardy*, 25 Wn. App. 146, 605 P.2d 791 (1980); RCW 9A.16.020.
[37] *State v. Arth*, 121 Wn. App. 205, 87 P.3d 1206 (2004).

Both Savelli and Arth got out of their cars and began to argue about their respective driving skills. The argument was heated and involved profane language and gestures. Eventually, Savelli ended the argument by getting back in his car. At this point, the two men's stories differed:

> According to Savelli, when he got back in his car, Arth began kicking the side panel and then jumped on the car and pounded it with his fists. Savelli testified that he believed Arth was trying to get in the car to hit him so he put his car in reverse, knocking Arth to the ground, and drove away.
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> According to Arth, Savelli threatened him with a gun during the initial verbal argument. When Savelli returned to his car, Arth began walking away, thinking the altercation was over. Savelli then backed up his car, hitting Arth in the leg. Arth responded by kicking Savelli's car. When Savelli put his car into reverse again, Arth believed Savelli was going to pin him between the building and the car so he jumped on top of the car and pounded it with his fists "until it moved." Savelli then drove away.38

At trial, Arth requested an instruction on defense of property. The trial court denied the request, reasoning that the malicious mischief instruction and accompanying definition of the term "malice" were sufficient to allow Arth to argue his theory of the case. In essence the trial court ruled that self-defense was not a defense to a malicious mischief charge because the defendant did not cause injury to the victim.

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[38] *Id.*

Division One disagreed with the trial court and reversed Arth's conviction. The court grounded its reasoning in both the statutory language of the self-defense statute (same one at issue here).

First, as noted by the *Arth* Court, by the plain language of the self-defense statute, self-defense is not limited to only crimes where the defendant causes actual injury to the victim, such as homicide or assault. Particularly relevant is the court's holding that "the mere fact that the 'use of force' in a particular case does not actually reach the victim . . . is not relevant as long as the force is used toward the person of another."

Second, the *Arth* Court noted that the plain language interpretation was supported by the purposes embodied in the self-defense statute itself. Specifically, the self-defense statute is designed to allow a citizen to defend himself from potential harm (such as an assault with a vehicle), but is only available if he uses the *least amount* of force that is reasonable under the circumstances. The Court aptly noticed that making self-defense available for an assault charge but not for malicious mischief would thwart the Legislature's intent and the statute's clear purpose:

> Under the State's reasoning, a person who defends himself could not assert self-defense if he used the least possible amount of force to prevent an attack by damaging the weapon rather than the person, while a person who used the

> greater amount of force to injure the person would have the defense available to him.[39]

In other words, had the jury believed Arth's claim that he only damaged the car to prevent Savelli from hurting him, Arth had likely used the least amount of force to defend himself and he should not be punished for not using *more force* (i.e. by assaulting Savelli), which would have allowed him to assert self-defense had he punched and kicked Savelli himself rather than his property.

The reasoning in *Arth* applies equally here. The resulting "harm" is far less than that normally allowed by the deadly force statute: injury to the alleged victim's person. Arguably, Mr. Longshore's alleged "threat" in this case was an even better example of the holding in *Arth* because unlike the defendant in *Arth*, who caused actual damage to the defendant's property, Mr. Longshore caused *no damage to person or property.*

4. THE STATE FAILED TO PROVE THAT MR. LONGSHORE ACTED WITHOUT LAWFUL AUTHORITY BEYOND A REASONABLE DOUBT.

To raise a claim of self-defense or "lawful force," the defendant must first offer *some* credible evidence tending to prove that defense.[40] This is a low threshold and only requires the defendant o present *some* evidence and that evidence can come from *any* source, so long as it tends

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[39] *Id.*
[40] *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627 (1999).

to prove that the defendant acted in self-defense.[41] The trial court must view the evidence from the standpoint of a "reasonably prudent person who knows all the defendant knows and sees all the defendant sees."[42]

Elston and the Aldridges were clearly the initial aggressors because (1) Elston intentionally parked his truck behind Mr. Longshore's car, blocking it in, well before Mr. Longshore threatened them; (2) Mr. Longshore did not cause any physical injury whatsoever; (3) Elston's bald accusations of criminal activity by Longshore were completely unsubstantiated; and (4) Mr. Longshore only threatened the victims when they refused to let him leave.

With these facts in mind, the fact finder could easily have found that Mr. Longshore acted in lawful defense of himself and his companions. From fact (1), it could have easily inferred that Elston and the Alridges were the aggressor and that Mr. Longshore and his companions feared imminent harm, i.e. the on-going unlawful imprisonment. From fact (2) and (3), the jury could have found that Mr. Longshore's mere *threat* to kill was objectively reasonable and involved the least amount of force (by actually using *no force*). From fact (4), it could have easily deduced that Mr. Longshore acted in a good faith belief

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[41] *State v. Summers*, 120 Wn.2d 801, 819, 846 P.2d 490 (1993) (citing *McCullum*, 98 Wn.2d at 500.)
[42] *State v. Brightman*, 155 Wn.2d 506, 520, 122 P.3d 150 (2005);

that threatened force was necessary to free himself from the unlawful citizen's arrest.

Not only did Mr. Longshore present enough evidence of lawful force, the State also failed to disprove it. Once a defendant has raised some evidence that the defendant's use of force was lawful, the State must prove absence of lawful force beyond a reasonable doubt. [43] Had the State shown, for instance, that Mr. Longshore lacked a good faith belief that threatening force was necessary under the circumstances, it could have proved the crime charged.[44]

But, the record lacks any evidence that Mr. Longshore lacked such an ill-intent. It merely shows that Mr. Longshore, his companions, and the borrowed car were all trapped, purposefully by three strangers in a parking lot. Considering the circumstances as they appeared to Mr. Longshore, no reasonable jury could have concluded that Mr. Longshore lacked such a good faith belief that his actions were necessary to get Elston to move his truck so he could free himself from being held against his will.

From Mr. Longshore's perspective, the undisputed facts showed Mr. Longshore was being unlawfully detained just as he tried to leave an apartment complex. These were not police officers, nor were they citizens

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[43] *Brightman*, 155 Wn.2d at 520 (deadly force).
[44] *Graves*, 97 Wn. App. at 62 (quoting *State v. Dyson*, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997)).

acting at the request of law enforcement. They were local residents who were concerned with unsubstantiated speculation that Mr. Longshore had been involved in criminal activity in the neighborhood.

From Mr. Longshore's perspective, these people had right to detain him. They were not police officers, so he had every right to resist the unlawful arrest. Though they may have thought that they were making a valid citizen's arrest, they clearly lacked the facts to support probable cause for such an arrest. More importantly, however, viewing the facts from Mr. Longshore's point of view, he had every right to demand that the truck be moved. And he did just that, but they first refused. Only after that refusal did he resort to threatening the alleged victims.

Moreover, making an empty threat, that was impossible to carry out, was objectively reasonable in this situation.[45] Let us not forget that while "*the use of force against another*, including causing injury, is privileged when necessary to protect persons or property."[46] But, Mr. Longshore did not even go that far. He used no violence and caused no injury. After all, "An individual who is privileged to cause injury undeniably is privileged to threaten to do so."[47]

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[45] *Graves*, 97 Wn. App. at 62 (quoting *State v. Dyson*, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997)).
[46] *Smith*, 111 Wn.2d at 9 (citing RCW 9.01.200; RCW 9A.16.020(3); RCW 9A.16.050).,
[47] *Id.*

By merely threatening Elston the *potential use of force*, rather than *actually using force* against Elston or his truck, Mr. Longshore used the *least* amount of force that was reasonable under the circumstances to free himself from what was clearly a citizen's arrest without probable cause. That threat posed no risk of harming the victims and it appeared entirely reasonable under the circumstances. The law should not impose criminal liability for such conduct.

And even though the so-called "victim" may have *believed* that Longshore was going to carry out the threat, Elston and his companions were quite clearly the "first aggressors" because they created the necessity for Mr. Longshore to make such a threat by blocking in the Dodge and preventing Mr. Longshore and each of his companions from leaving. When Mr. Longshore threatened to shoot Elston and the Aldridges, he did so lawfully to prevent himself, Ms. Pena, and Ms. Waterman from being unlawfully imprisoned. Mr. Longshore's sole purpose in making the threat was to free himself from an unlawful restraint, and he lacked a weapon with which to carry out the threat.

In light of these facts, no reasonable jury could have convicted Mr. Longshore of felony harassment, and his conviction should be dismissed.

D. MR. LONGSHORE WAS DENIED DUE PROCESS BECAUSE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON "WITHOUT

LAWFUL FORCE"—AN ESSENTIAL ELEMENT OF FELONY HARASSMENT.

1. STANDARD OF REVIEW

Because the jury instructions are designed to simplify the law in a way that average citizens (rather than lawyers) may understand, jury instructions are only sufficient if they make the law "manifestly clear" to the average juror.[48] To determine whether jury instructions meet this standard, the court's review is *de novo.*[49]

2. THE COURT'S DEFINITION OF "WITHOUT LAWFUL FORCE" FAILED TO COMPLY WITH DUE PROCESS BECAUSE IT FAILED TO GIVE THE JURY *ANY* GUIDANCE WHATSOEVER AS TO HOW THE STATE COULD HAVE PROVED THAT ELEMENT.

It is a basic principle of due process that jury instructions must define every element of the offense charged.[50] If the jury must guess at the meaning of an essential element of a crime, or if the jury might assume that an essential element need not be proved by the state, it cannot be said that a defendant has had a fair trial.[51]

As stated above, "without lawful authority" is an essential element of the crime of harassment. And Mr. Longshore certainly presented evidence that he was acting with lawful authority when he threatened the

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[48] *State v. Lefaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996).
[49] *State v. Brett,* 126 Wn.2d, 136, 171, 892 P.2d 29 (1995).
[50] *See, e.g., State v. Emmanuel*, 42 Wn.2d 799, 821, 259 P.2d 845 (1953); *State v. Timmons*, 12 Wn. App. 48, 55, 527 P.2d 1399 (1974).
[51] *Johnson*, 100 Wn.2d at 674.

so-called victims: he was trying to end the ongoing unlawful imprisonment. The State, therefore, had to disprove that he was acting without lawful authority.

But, the trial court failed to offer a meaningful definition of "lawful authority." It defined lawful authority as "authorized by law". This definition was not helpful for the jury. This definition was useless. It might as well have omitted the instruction completely. The definition given by the court amounted to omitting the element of lawful force completely and was thus a manifest error affecting a constitutional right. Mr. Longshore can raise the issue for the first time on appeal.[52]

Not only was the instruction on "unlawful force" not helpful, it was confusing to the jury and harmful to Mr. Longshore's defense. At trial, Elston admitted that he blocked in the vehicle Longshore was driving and prevented Longshore from leaving against his will.[53] The evidence shows that Elston was the initial aggressor and placed Longshore, Waterman, and Pena under unlawful restraint. Hypothetically, a reasonable jury could have believed that Longshore was not the *type of person,* i.e. a police officer, *authorized by law* to make such a threat and thus convicted him. In reality, ordinary citizens are granted *lawful*

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[52] *See Id.*
[53] RP 53.

authority by both common law and statute to make threats *under certain circumstances*.).[54]

The jury should have been instructed on RCW 9A.16.020 (3) and asked to determine whether Longshore's threat was reasonable to prevent an ongoing or impending offense against him and his companions. Instead, the jury was left to guess as to the circumstances under which harassment would be lawful. Without an adequate definition of the term, the jury to was likely forced to speculate as to what constituted "lawful authority." Without a specific definition, such speculation would only increase the likelihood of a wrongful conviction here, as there are at least six different ways for force to be lawful, as described in the statute itself.

The use of force is lawful if it is (1) necessarily used by a public officer performing a legal duty; (2) necessarily used by a person arresting someone who committed a felony and delivering that person into custody; (3) used in defense of self, others, or property; (4) used to detain someone who unlawfully enters or remains in a building and reasonably necessary for investigation; (5) used by a passenger carrier to remove a passenger who refuses to obey lawful, reasonable regulations; or (6) used to prevent

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[54] *See Smith*, 111 Wn. 2d at 9; RCW.9A.16.020 (use of force – when lawful

a mentally ill, mentally incompetent, or mentally disabled person from committing a dangerous act to any person.[55]

Jury instruction no. 14's insufficient definition of lawful authority forced the jury to guess the meaning of an essential element of the crime of harassment. The fact that the court chose to define "under lawful authority" offers evidence that the court found the term confusing. However, defining "under lawful authority" as "authorized did nothing to alleviate that confusion. The jury instructions, as provided, did not afford the jury the opportunity to adjudge whether it believed Longshore's actions were justified. As a result of this error, Longshore was denied his constitutional right to a fair trial. The error was not harmless. If the jury had been presented with an accurate statement of the law, it cannot be said that they would have deemed Longshore's actions to be unlawful beyond a reasonable doubt.

E. THE STATE FAILED TO PROVE THAT MR. LONGSHORE HAD CONSTRUCTIVE POSSESSION OF THE PIPE AND METHAMPHETAMINE RESIDUE IN IT.

Under Washington law, it is unlawful for any person to possess a controlled substance.[56] To prove unlawful possession of a controlled substance, the State must only prove two: the nature of the substance and

[55] RCW 9A.16.020
[56] RCW 69.50.4013.

the fact of possession.[57] As the mere possession statute is currently interpreted, possession of drug residue in a pipe can appropriately be charged as possession of a controlled substance because there is no minimum amount of drug that must be possessed in order to sustain a conviction.[58]

That possession may be actual or constructive.[59] Actual possession requires the drugs to be within the personal custody of the defendant.[60] Because there was no evidence that Mr. Longshore had actual possession of the drugs, his conviction could only be upheld if there was sufficient evidence that he had constructive possession of the pipe.

Constructive possession requires that a defendant has dominion and control over the drugs in question.[61] Whether a person has dominion and control is determined by the several factors, their cumulative effect, and the totality of the situation.[62] While control need not be exclusive, mere proximity to the drugs is insufficient to prove constructive

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[57] *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004); *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).
[58] *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008).
[59] *Callahan*, 77 Wn.2d at 27.
[60] *Id.*
[61] *E.g., Callahan*, 77 Wn.2d at 27; *State v. Chavez*, 138 Wn.App. 29, 156 P.3d 246 (2007).
[62] *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977).

possession.[63] Similarly, a momentary handling or temporary passing of the drugs is insufficient to establish dominion and control.[64]

The fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the drug without more is insufficient to show the dominion and control necessary to establish constructive possession.[65] Constructive possession of the premises on which the drugs are found is not, on its own, sufficient to prove constructive possession of the drugs themselves.[66]

In *Callahan*, the defendant was found on a friend's houseboat in close proximity to various drugs.[67] He was convicted of illegally possessing dangerous drugs. The record indicated that the defendant had been staying on the houseboat for two to three days, and a number of his possessions were recovered on the premises, including a pair of scales which could have been used to measure drugs. The defendant also admitted to having handled the drugs earlier in the day. However, there

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[63] *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968); *State v. Wheatley*, 10 Wn. App. 777, 519 P.2d 1001 (1974); *State v. Hystad*, 36 Wn. App. 42, 671 P.2d 793 (1983).
[64] *See State v. Werry*, 6 Wn. App. 540, 494 P.2d 1002 (1972).
[65] *State v. Davis*, 16 Wn. App. 657, 558 P.2d 263 (1977); *see also State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004) (the court found the evidence insufficient to establish dominion and control where a passenger in a vehicle left fingerprints on a jar containing contraband).
[66] *See, e.g., State v. Olivarez*, 63 Wn. App. 484, 820 P.2d 66 (1991); *State v. Roberts*, 80 Wn. App. 342, 353, 908 P.2d 892 (1996); *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992); *State v. Collins*, 76 Wn. App. 496, 886 P.2d 243 (1995); *State v. Tadeo-Mares*, 86 Wn. App. 813, 939 P.2d 220 (1997)
[67] *Callahan*, 77 Wn.2d at 27.

was no evidence that the defendant had participated in paying rent or had made the boat his permanent residence. The Court reversed, reasoning that the single fact that the defendant had personal possessions on the houseboat was insufficient to support a possession charge.[68]

Longshore did not own the vehicle in which the drugs were found. In fact, the record indicated that Mr. Cuzick was both the driver and owner of the Dodge. The only piece of evidence linking Longshore to dominion and control over the Intrepid was a letter addressed to "Charles" found in the glove box. Although a single letter addressed to Mr. Longshore was located in the glove box, this letter fails to show dominion and control over the vehicle because unlike evidence that is typically indicative of ownership of the vehicle, such as a car registration or insurance, its placement in the glove box is no more significant than its placement on the floor of the vehicle might be. It tends to show nothing more than what we already know, that Mr. Longshore had previously ridden in the vehicle.

And even if the letter proved dominion and control over the Intrepid, it is a crime to have dominion and control *over a controlled substance*, but not to have dominion and control over the premises where the substance is found.[69] Thus, even if the State proved that Longshore

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[68] *Id.*
[69] *See Olivarez*, 63 Wn.App. at 484.

effectively had dominion and control over the car, which the prosecution did not, that fact alone was insufficient to convict him of possession.

The rest of the facts are far too tenuous to establish Mr. Longshore's dominion and control over the *substance* (or actually the *residue* of the substance) itself. Mr. Longshore's finger prints were not found on the pipe. No evidence showed that he ever handled or even touched the pipe. No evidence was offered to explain how the drugs may have arrived there. No evidence suggested that Mr. Longshore had recently used methamphetamine.

Viewing the evidence in the light most favorable to the State, these facts could be relevant to establish possession: (1) the pipe containing the residue was found in a car that did not belong to Mr. Longshore, although he borrowed it on the day in question and had driving it several times before; (2) the methamphetamine residue was only recognizable as such by chemical testing; (3) the pipe was stuck in between the driver's seat and the door, but the pipe was covered by a woman's sock, hiding the pipe from plain view; (4) at least two women had occupied the car that day; and (5) the pipe itself, even if visible, resembled pipes which are commonly used for smoking other legal drugs, such as tobacco and marijuana.

Even viewing these facts in the light most favorable to the State, no reasonable jury could have found that Longshore had dominion and

control over the pipe and its contents beyond a reasonable doubt. As a result, Longshore's possession conviction should be dismissed.

F. MR. LONGSHORE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE DEFENSE COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON UNWITTING POSSESSION.

Under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings.[70] A court's inquiry is largely fact based. Rather than applying mechanical rules to every case, the court evaluates the facts of each case in pursuit of answering one ultimate question: did defense counsel's deficient performance deny the defendant a fair trial.[71] Longshore received ineffective assistance of counsel, because (a) his trial attorney's performance was "objectively unreasonable," and (b) he was prejudiced by the deficiency.[72]

1. DEFENSE COUNSEL WAS OBJECTIVELY UNREASONABLE BECAUSE HE FAILED TO ASSERT THE DEFENSE OF UNWITTING POSSESSION, WHICH WAS THE ONLY VIABLE OFFENSE TO THE OFFENSE.

Generally, courts will presume that defense counsel rendered constitutionally adequate performance.[73] However, petitioner can "rebut

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[70] *Strickland v. Washington,* 466 U.S. 668, 684–86 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996); *see also In re Pers. Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001).
[71] *Strickland,* 466 U.S. at 696.
[72] *Id.* at 687.
[73] *State v. McFarland,* 127 Wn.2d, 322, 335, 899 P.2d 1251 (1995).

this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy."[74] "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." [75]

To prove simple, the State has the burden of proving only two elements: the nature of the substance and the fact of possession.[76] The crime does not require that the defendant "knowingly" possess the drugs and is therefore, a strict liability crime.[77] As a result, a defendant may be convicted of the crime without having any moral culpability.

To alleviate the harshness created by this strict liability crime, the Washington Supreme Court created affirmative defense of unwitting possession.[78] The defense applies in two circumstances: (a) when the defendant possessed the drug, but did not know that he possessed it, i.e. if he borrowed a friend's jacket with cocaine in it; (b) when the defendant possessed the drug and knew that he possessed something—such as a baggie with white crystals or a pipe with drug residue—but he failed to

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[74] *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89).
[75] *Id.*
[76] *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004).
[77] *Id.*; RCW 69.50.4013.
[78] *Id.*

realize the "nature of the substance", i.e. that the residue was a controlled substance.[79] If a reasonable juror could find either of these two alternatives, the court must instruct the jury on the defense when requested.[80]

In this case, had defense counsel requested such an instruction, the court would have been obligated to give one. The facts at trial easily support the defense. It was not disputed that the car in which the pipe was found did not belong to Mr. Longshore. They sock it was found in belonged to a woman, not Mr. Longshore. Defense counsel even insinuated that Mr. Longshore did not know who the pipe belonged to or how it got into the car. Mr. Longshore was convicted merely because of his proximity to the pipe, even though it was unclear who the pipe belonged to or how long it had been in the vehicle.

Further, defense counsel's failure to request the instruction was not a *reasonable* trial tactic because it can and should be argued congruently with Mr. Longshore's lack of constructive possession of the pipe. Defense counsel argued that Longshore did not possess the pipe. But this argument does not require the jury to convict if it finds that Mr. Longshore did not

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[79] *Id.*
[80] *See State v. Riker*, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994); *State v. Buford*, 93 Wn. App. 149, 153, 967 P.2d 548 (1998).

know that the pipe was in the car, or even if he did, that the pipe contained methamphetamine residue.

Thus, without an instruction on unwitting possession, even the evidence did establish that Mr. Longshore somehow constructively possessed the pipe, the jury could still convict Mr. Longshore even if it believed that he had no idea that he constructively possessed the substance. Mr. Longshore only stood to benefit from an instruction on unwitting possession and there was no objectively reasonable excuse to not do so. His trial counsel was, therefore, defective under *Strickland.*

2. PREJUDICE: WITHOUT AN INSTRUCTION ON UNWITTING POSSESSION, THE JURY COULD STILL CONVICT MR. LONGSHORE, EVEN IF IT FOUND THAT HE HAD NO KNOWLEDGE THAT THE PIPE WAS IN THE CAR OR THAT THE PIPE CONTAINED METHAMPHETAMINE RESIDUE.

The remaining question is prejudice. It requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[81] In other words, counsel's deficiencies must have adversely affected the defendant's right to fair trial to an extent that "undermine[s] confidence in the outcome."[82]

In this case, if this court does find sufficient evidence that Mr. Longshore constructively possessed the pipe with methamphetamine

[81] *Strickland*, 466 U.S. at 694.
[82] *Id.*; *Brett,* 126 Wn.2d at 199, 892 P.2d 29.

residue in it, the need for the unwitting possession defense becomes all the more clear, because without asserting the defense, the jury did not need to acquit Mr. Longshore even if it was 100% certain that Longshore was unaware of the pipe's presence in the vehicle he drove. The State can prove possession without proving that the defendant had any knowledge that he possessed the controlled substance. This is of specific importance here, where trace amounts of methamphetamine residue were found in a pipe inside of a footie style sock generally attributed to women.

When the State alleges that the defendant had constructive possession of a controlled substance, the risk that a person may be convicted without knowing he possessed the substance or that it was illegal is magnified to an unacceptable degree because the State's burden to prove constructive possession is miniscule. If this court upholds Mr. Longshore's conviction here, it serves as the perfect example of the minute amount of evidence needed for a conviction based upon constructive possession.

Here, the State only proved the following facts: (1) a pipe was found in a vehicle that Mr. Longshore was driving the vehicle on the day in question, (2) the pipe was wrapped in a sock, so not necessarily visible to the driver of the car, (3) the sock was one that a woman would wear, (4) the pipe did not contain more than residue of what eventually turned out to

be methamphetamine, but only through scientific testing, and (5) the pipe was not evidence of methamphetamine use to the ordinary person because the State did not rule out other possible lawful uses, such as the smoking of tobacco or marijuana.

Longshore's counsel's failure to request an unwitting possession prejudiced Mr. Longshore, because it deprived him of an affirmative defense to a possession charge which could be proven through tenuous circumstantial evidence and trace amounts of methamphetamine. Defense counsel provided the jury with evidence supporting Longshore's lack of knowledge, however failed to provide the jury with the applicable law with which to acquit Mr. Longshore.

This evidence suggests that, had defense counsel requested an instruction on unwitting possession, the result of the proceeding would have been different. Even if this Court finds that the evidence established constructive possession, Mr. Longshore's conviction warrants reversal due to ineffective assistance of counsel.

G. THE IDENTIFICATIONS MADE BY OFFICER PATTON WERE UNDULY SUGGESTIVE AND ADMITTING THEM VIOLATED LONGSHORE'S RIGHT OF DUE PROCESS.

"The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor-perhaps it is responsible for more such errors than all other factors

combined."[83] Accordingly, the Due Process Clause seeks to prevent such wrongful convictions by invalidating witness identifications that are so unreliable that the risk of wrongful conviction outweighs the State's desire to admit such an identification. This is such a case. Specifically, at trial, Officer Patton twice claimed to identify Mr. Longshore as the driver of the eluding vehicle.

To demonstrate that Officer Patton's in-court identification was inadmissible under Due Process, the court's analysis is two-fold. First, it must first establish the identification procedures to be impermissibly suggestive.[84] Next, the court must then determine whether the impermissibly suggestive procedures created a "substantial likelihood of irreparable misidentification."[85]

To determine whether there is a substantial likelihood of irreparable misidentification, the court weighs the factors that might favor the witness's reliability against the "'corrupting effect of the suggestive identification."[86] The relevant factors include " 'the opportunity of the witness to view the criminal at the time of the crime, the witness's degree

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[83] *United States v. Wade,* 388 U.S. 218, 229 (1967) (quoting Patrick M. Wall, Eye–Witness Identification in Criminal Cases 26 (1965)).
[84] *See State v. Vaughn,* 101 Wn.2d 604, 609-10, 682 P.2d 878 (1984).
[85] *State v. McDonald,* 40 Wn. App. 743, 746, 700 P.2d 327 (1985) (quoting *Simmons v. U.S.,* 390 U.S. 377, 384 (1968)).
[86] *Id.* at 746 (quoting *Manson v. Brathwaite,* 432 U.S. 98 (1977)).

of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[87]

Patton's first identification was highly unreliable. Several facts from the record support this conclusion.

First, Officer Patton's opportunity to view the driver of the vehicle was poor. He was not afforded more than a few seconds to try to spot the driver and identify him. Patton claimed to have been able to identify Longshore as the driver in the split seconds in which the Intrepid flew past him. Moreover, although Officer Patton claims that these few seconds were enough to identify the driver, his own testimony undercuts that claim. Had Officer Patton had enough time to focus his attention on the driver of the car, he most likely would have at least noticed whether someone else was sitting in the front passenger seat with him.

Yet, Patton admitted that he could not be certain whether *anyone* else was in the car. And, perhaps the nail in the coffin is the tinted windows on the suspect car, which certainly made identifying the driver of the vehicle next to impossible, especially in such a short amount of time. This factor weighs against finding his identification reliable.

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[87] *State v. Maupin,* 63 Wn.App. 887, 897, 822 P.2d 355 (1992) (quoting *Brathwaite,* 432 U.S. at 114).

Second, at the time that he claims to have identified Mr. Longshore, Officer Patton's degree of attention on the face of the driver was surely low. Officer Patton testified that he had been picking up road spikes he had placed earlier at an intersection when the Dodge sped through the stop sign into the intersection and recklessly turned at a high speed. Officer Patton admitted that he was shocked and not prepared to see the high speed chase coming straight towards him.

In addition, Officer Patton claimed that the vehicle came so close to striking him that Officer Patton admitted that he should have jumped out of the way in order to avoid being struck. Had the car hit Officer Patton, it most likely would have killed him at such a high rate of speed. This apparent near-death experience must have caused Officer Patton to focus less on the drivers face and more on his own safety. This factor also weighs against reliability.

Third, the description that Officer Patton gave of the driver was so general that it could not possibly weigh in favor of reliability. Having seen Mr. Longshore previously and also having expected Mr. Longshore to be the driver, Officer Patton's identification of Longshore as the driver is not at all surprising and not at all detailed enough to make his alleged identification reliable. Despite being able to positively identify Mr.

Longshore in such a short amount of time, Officer Patton could still not identify, even generally speaking what the driver was wearing.

Finally, the most troubling aspect of the identification is the obvious that Officer Patton's identification was equivocal until he heard Mr. Longshore's name over the radio. Initially, Officer Patton claimed during his first identification that he thought the driver was Mr. Longshore, whom he had had several encounters with in the past. Then, he heard a report over the radio that Charles Longshore was driving the Intrepid. Only then was Officer Patton suddenly "certain" that it was him. This newly acquired certainty, however, had no apparent bearing on *what* Officer Patton *saw*, it was dependent upon what he *heard.*

Patton's second ID was even more unreliable than the first. The first problem with the second identification is obvious: it came only after he received an unverified report that Mr. Longshore was driving the Intrepid. Had he not claimed to identify Mr. Longshore after the first opportunity, the second identification would surely have been tainted and inadmissible. But, even with that in mind, the second so-called identification is not reliable at all because Officer Patton admits that his view of the driver was even worse this time than the first:

> **Q:** Okay. So before the car turns off Old Olympic Highway, describe your observations of the vehicle and the driver of the vehicle at KTP Express, and how close you were.

> **A:** It was the same vehicle. Once again, maybe 15, 20'. This time my observations were – were not as good 'cause Im physically in my vehicle, the vehicle's coming at me. And it was – it was rather quick, I just wasn't as close. I observed that the driver was now wearing some type of dark colored – I don't know if it was a sweater, jacket, what-not, but something dark that contained some type of hooded – observed some type of hood on top. But it was the exact same vehicle.[88]

At the end of the day, the court here is confronted with two very speculative identifications of an Officer who probably tried to testify truthfully, but could not do so because someone else identified Mr. Longshore over the radio for him and without a credible source. These identifications were not reliable enough to go to the jury and there is a very substantial risk that they were improperly influenced by the unsubstantiated report over the radio. Officer Patton was told over the police radio that the man he had seen was Charles Longshore.

Officer Patton's identification of Longshore should not have been admitted at trial. The testimony of Officer Patton severely prejudiced Longshore because it called into question the testimony of the *only person who witnessed the suspects exit the vehicle*. Because Patton was allowed to testify Mr. Probst's testimony, that a *fourth* passenger drove the vehicle before fleeing the scene, was called into question. Due to the likelihood

[88] RP 137.

that Officer Patton's tainted identifications prejudiced Mr. Longshore's trial, Longshore's conviction for eluding must be reversed.

H. WITHOUT OFFICER PATTON'S INADMISSIBLE "IDENTIFICATION", THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. LONGSHORE WAS DRIVING THE CAR WHEN IT WAS ELUDING POLICE.

In a criminal trial, it is axiomatic that the prosecution must establish that the defendant was the man who actually committed the offense charged.[89] It should be obvious that it is not enough for the State to prove that a defendant was at the scene of the crime and had the *opportunity* to commit the crime. This rule is highlighted well by Washington case law on what is required to establish corpus delecti in cases in which "identity" is inherent in the offense. Generally, the State cannot meet its burden of proof.

This principle is highlighted in *State v. Wright*. In that case, a police officer heard gunfire and spotted Wright standing on a street corner with another individual.[90] The officer approached the two men and interrogated and asked them who shot the firearm. In response to the officer's question, Wright stated that the shots had come from a car located nearby. After confirming that the shots could not have come from the car, the officer returned to Wright and observed him and the other man

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[89] *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).
[90] *State v. Wright*, 76 Wn. App. 811, 819, 888 P.2d 1214 (1995).

standing near some bushes. The officer found a gun in the bushes and confronted Wright, who eventually confessed to possessing the gun. Wright was convicted of unlawful possession of a firearm.

On appeal, Wright argued that the State failed to prove his identity with corroboration required to prove corpus delecti, which the court noted only requires a "relatively modest amount of evidence." The court noted that the following facts were insufficient because they failed to set Wright apart from his companion and thus as the person in possession of the gun:

> (1) Fountain heard a gunshot;
> (2) Wright was close to or in the place from which the shot had evidently been fired;
> (3) Wright gave the officer false information;
> (4) Wright was next to the bushes with his hands out of view when Fountain returned;
> (5) Fox found the gun in those bushes; and
> (6) there was evidence that it had been placed there recently.[91]

The facts in *Wright,* which were insufficient to even corroborate the confession in that case. If these facts were insufficient because establish the corroboration required to prove corpus delecti, a notably *lower* standard than that required to withstand a challenge to the sufficiency of the evidence, then the State surely failed to prove that Mr. Longshore was the driver of the car when it eluded police. Without the unreliable and inadmissible identifications discussed above, the facts of

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[91] *Id.*

this case were similarly insufficient to prove that Mr. Longshore was the driver of the Dodge when it eluded police.

Perhaps realizing the weakness of this identifications, the State tried to make tenuous connections between the innocuous facts that it did prove and relate them to Mr. Longshore's driving. These arguments are not persuasive. Moreover, the attacks on the credibility of Mr. Longshore's timeline of events was similarly unconvincing.

But, law enforcement never spoke to Ty Cuzick about his involvement in the crimes charged, even though he was an obvious suspect in the crimes alleged. Further, they only spoke to Probst–an obviously critical eye-witness to the crimes charged–for the first time just two weeks before trial.

The prosecutor's argument during closing highlighted the holes in the State's case. In particular, in its attempt to reconcile the obvious inconsistencies in the evidence, the State contradicted its own theory of the case as to how many people were in fact in the vehicle when it crashed and the case ultimately ended. "In regards to Mr. Probst. There was some allegations by counsel that somehow we were trying to discredit him. We – the testimony that he provided is not inconsistent with the police officer's testimony." RP 438. If the State's position was that Probst had

told the truth, the only logical determination that could be made was that Mr. Longshore did not drive the Dodge during the chase.

The State advanced two inconsistent theories of the case and certainly misrepresented the facts when it told the jury that it was undisputed by the State that *four* people exited the car when the pursuit ended, even though it was also undisputed that only three people were in the car as it left the Fircrest apartments.

The prosecutor, for example, advanced the following argument, which was completely inconsistent with its previous arguments to the jury:

> "[Probst] said he concluded that the same man who was – who was arrested was the same guy who got out of the car from the passenger set wearing the white shirt. He didn't say he knew that. He couldn't see what was going on behind the shed. He can't testify whether or not an individual in the black jacket who left the scene returned from behind the shed, shed his jacket exposing his white shirt, and then acted as if someone else left the scene and left the jacket behind, which is by the way, corroborated by the evidence. You'll recall that a black jacket was found within feet of the vehicle."

RP 439. In other words, during its closing argument, the State appears to have adopted the theory that at some point after leaving the Fircrest apartments, Longshore picked up a fourth passenger, but did not relinquish the wheel and continued to drive. Then Mr. Longshore jumped over the fence, took off his jacket, threw it behind the shed and then returned to the vehicle to wait for police to arrive. Meanwhile, the fourth passenger had

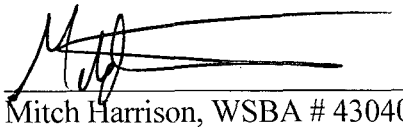
to have left the car, went behind the shed with Waterman and Pena, and then fled the scene when Longshore came back.

This theory was entirely unsupported by any evidence, contradicted earlier arguments, and frankly, asked the jury to ignore its own common sense. It would violate the very core of due process to allow a jury to convict Mr. Longshore when the State consistently acknowledged the holes in its case.

Because two officer's identifications of Mr. Longshore were unconstitutionally unreliable, the State failed to produce sufficient evidence that Mr. Longshore was the driver of the Dodge when it eluded police. This charge must be dismissed.

V. CONCLUSION

For the foregoing reasons, this court should grant Mr. Longshore the relief designated above.



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PROOF OF SERVICE

On December 5, 2013, I placed the attached Supplemental Brief of Appellant in First Class U.S. Mail. I mailed the original and two copies to their respective locations below.

1. Court of Appeals, Division II, via U.S. Mail at 950 Broadway, Ste 300, MS TB-06, Tacoma, WA 98402-4454.

2. Mason County Prosecuting Attorney's Office, Appellate Unit at P O Box 639, Shelton WA 98584

3. The Appellant, Charles Longshore, Charles Longshore, DOC # 332121, 191 Constantine Way, Aberdeen, WA 98520

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Dated December 5, 2013.

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