SUPREME COURT CASE NO. 90949-1

COA NO. 71644-1-I

SUPREME COURT OF WASHINGTON

CHARLES LONGSHORE, Appellant,

v.

STATE OF WASHINGTON, Respondent,

Petition for Review

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I. The Petitioner & The Court of Appeals' Opinion

Mr. Longshore was convicted of multiple crimes in Mason County Superior Court. He appealed his convictions to Division II of the Court of Appeals but was subsequently transferred to Division I of this court. Division I ultimately denied his appeal in its entirety in an unpublished opinion, herein after (the "Opinion"). For the reasons stated below, Mr. Longshore now asks for this court to grant discretionary review of that decision.

II. Issues Presented for Review

A. Whether constructive possession of a controlled substance is proved, as a matter of law, whenever the State proves that the accused possessed the premises in which those drugs were found.

B. Whether defense counsel renders ineffective assistance of counsel under *Strickland* when he fails to raise unwitting possession as dual or alternative defense to lack of possession when the State has already made a prima facie case fore for constructive possession and the facts would wholly support both defenses.

C. Whether defense counsel renders ineffective assistance of counsel under *Strickland* when (1) he fails to argue to the jury that a the accused lawfully threatened the victim in defense of himself or his property, when the law fully supported the defense, (2) he fails to propose a jury instruction on lawful force to support such a defense, and (3) no other objective reasons, such as conflicting defenses, justified not arguing such a defense.

III. Statement of the Case

On March 25, 2012, Charles Longshore decided to visit some friends who lived in Shelton, Washington. Mr. Longshore borrowed a friend's car, a Dodge Intrepid, picked up two of his friends, and drove to

meet a third friend, who lived at the Firwood Garden apartments. When they arrived however, two of the residents, Elston and Aldrige, spotted Mr. Longshore and his friends, and purposefully blocked Mr. Longshore, his car, and his passengers from leaving the apartment complex by parking a large truck directly behind the Dodge Intrepid.

Initially, Elston and Aldrige refused to move their car and an argument ensued. Mr. Longshore wanted to leave, and he gave Eltson and Eldige an ultimatum: let him and his friends go, or force him to have to retrieve a gun from his car. In reality, Mr. Longshore did not in fact possess a gun. Nevertheless, the ruse worked, Elston and Eldige moved their car, and Mr. Longshore and company left peacefully.

Later that day, Elston and Aldrige would report Lonshore's threat to police, who would eventually locate the Dodge Intrepid and engage in a brief car chase.[1] Ending with the driver crashing the car.

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.[2] The pipe contained residue which was tested and found to contain methamphetamine.[3] The Dodge did not belong to Mr.

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[1] RP 294.
[2] RP 203-05; Exhibit 11 (photo of sock).
[3] RP 157-63; RP 204.

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. Longshore had ingested methamphetamine on the day in question.

Charles Longshore was arrested for and later charged with Felony Harassment, Eluding a Police Vehicle, and Possession of a Controlled Substance.[4] A jury convicted Mr. Longshore on all counts. Mr. Longshore appealed. Mr. Longshore filed his direct appeal. In that appeal, he advanced several arguments, three of which are relevant here:

(1) The evidence was insufficient to uphold the Felony Harassment conviction because the State failed to prove that Mr. Longshore's threat to Elston was made without lawful authority.

(2) The evidence was insufficient to prove that Mr. Longshore constructively possessed the methamphetamine because (1) the methamphetamine was residue found inside a pipe and undetectable to the human eye (2) that pipe was hidden from plain view, and wrapped inside a woman's sock, (3) . . . .

(3) Trial counsel was ineffective for failing to consider and advance an unwitting possession defense and offer a jury instruction on that defense.

[4] CP 99-101, 112-14.

Division II (case number 44323-6) to Division I under this cause number. Subsequently, Division I denied Mr. Longshore relief in an unpublished opinion.

IV. WHY THIS COURT SHOULD ACCEPT REVIEW

A. THE OPINION CONFLICTS PRECEDENTS FROM THIS COURT AND FROM LOWER COURTS, BECAUSE IT PRESUMES PROOF THAT ONE CONSTRUCTIVELY POSSESSES A CONTROLLED SUBSTANCE *WHENEVER* HE PROVES CONSTRUCTIVE POSSESSION OVER THE PLACE IN WHICH THE SUBSTANCE WAS FOUND.

On appeal, Mr. Longshore argued that the evidence was insufficient to prove that he constructively possessed the trace amounts of methamphetamine found in the car. In support of this argument Mr. Longshore argued that under *Calahan*, and other cases, the State had to prove more than dominion and control over the vehicle in which the drugs were found. Instead, the State had to prove that Mr. Longshore had dominion and control over *the drugs* found inside that car.

The Opinion rejected this reading of *Callahan*, however. Instead, the Opinion claims that Callahan stands for the following proposition:

> "Constructive possession of drugs requires that a person exercise dominion and control over the drugs *or the premises where the drugs are found*."[5]

In other words, "constructive possession of drugs" can be proved in two separate ways: if the accused exercises "dominion and control over" (a)

[5] Opinion at 19 (citing Callahan, 77 Wn.2d at 29-30).

the drugs . . . found," or (b) the place (or "premises") "where the drugs are found." [6] But this holding is incorrect under well-established Washington precedent from this court, as well as several other Court of Appeals decisions interpreting that law. Review is therefore warranted under RAP RAP 13.4(b)(1)-(3), as discussed below.

As a preliminary matter, the Opinion's holding appears to ignore the plain language of RCW 69.50.4013. That statute imposes strict liability upon certain persons, explicitly saying that it is "unlawful for any person *to possess a controlled substance*."[7] The statute does not define what constitutes "possession," instead choosing to leave that word defined by common law and common sense.

But neither Supreme Court precedent, nor common sense, support the sweeping language used by in the Opinion that holds that constructive possession of the substance necessarily proves constructive possession of the substance itself.

First, this Court has never endorsed the sweeping language used in the Opinion that dominion and control of a car or house is *always* sufficient to prove possession of the *substance* found therein. On many

[6] Opinion at 19. Later on, the Opinion applied this interpretation to Mr. Longshore's case, holing that "[t]he evidence offered by the State was sufficient to establish that Longshore *exercised dominion and control over the vehicle in which the methamphetamine was found.*"
[7] RCW 69.50.4013

occasions, this court has had the opportunity to interpret the constructive possession as the Opinion claims here, but has not done so.

In fact, in every such opinion, this Court has specifically held that constructive possession requires proof "dominion and control" over the drugs themselves, and not just the premises they are found in.[8] No case from this Court supports the Opinion's broad holding that constructive possession is *always* proved when the defendant possess the home or vehicle in which those drugs are found.

Second, even if there was such a case that endorsed the Opinion's sweeping language, this Court has always required lower court's to review the particular facts of each case before finding constructive possession. In *Partin*, this Court said that when reviewing the sufficiency of a conviction based upon constructive possession, we must "look at the totality of the situation" that was before the jury before the jury to determine whether

[8] *State v. Callahan*, 77 Wash. 2d 27, 29, 459 P.2d 400, 401-02 (1969) ("constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has *dominion and control over the goods*."); *State v. Partin*, 88 Wash. 2d 899, 906, 567 P.2d 1136, 1140 (1977) *disapproved on other grounds by State v. Lyons*, 174 Wash. 2d 354, 275 P.3d 314 (2012) (The court must "look at the totality of the situation" before the jury and ask whether, considering those facts, "the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them."); *State v. Jones*, 146 Wash. 2d 328, 333, 45 P.3d 1062, 1064-65 (2002) (stating that constructive possession requires that the defendant have "dominion and control over *the item*.").

"the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them."[9]

This court applied that standard in *State v. Jones*, for example, when it held that the State proved constructive possession of a purse inside the vehicle. But, in doing so, it did so only after evaluating the facts of the case at hand, and held them sufficient under facts that are far more damning than those we have here. In that case, this court reasoned that the trial court "appropriately found that Jones had constructive possession of the purse" because (1) he "exercised control over his car," (i.e. control of the premises), (2) he also exercised control of "the contents" of the car, including the purse, (3) "he stored items in the purse," and (4) "he admitted that the gun in the purse belonged to him."[10]

But here, unlike in *Jones*, the court of appeals holding throws this individual analysis out the window, and replaces it with a one-size-fits all answer to a very fact-specific question: whether the evidence was sufficient, as a matter of law, to go to the jury.

In fact, Division I previously admitted in *George*, "constructive possession cases are fact sensitive."[11] Just because the jury found the evidence sufficient does not mean the Court of Appeals should also. On

[9] *State v. Partin*, 88 Wash. 2d 899, 906, 567 P.2d 1136, 1140 (1977) *disapproved on other grounds by State v. Lyons*, 174 Wash. 2d 354, 275 P.3d 314 (2012).
[10] *State v. Jones*, 146 Wash. 2d 328, 333, 45 P.3d 1062, 1065 (2002).
[11] *State v. George*, 146 Wash. App. 906, 920, 193 P.3d 693, 699 (2008)

review, the reviewing court must perform its own independent review of the case to see if the evidence was sufficient. To do this, the reviewing court should "look not only to the rule as established by *Callahan,* but also to the results reached in decisions on comparable facts."[12]

Third, the Opinion's holding, applied literally, conflicts with this court's holding in *Grande*, in which the court held that merely driving or being a passenger in a car with drugs in it is insufficient to arrest someone for violating RCW 69.50.4013 until the officer develops "specific evidence" that clearly associates the accused with the drugs in the car.[13]

In that case, the defendant (the driver) and a friend (the passenger) stopped for speeding. After approaching the car, the officer smelled the odor of burnt marijuana coming from the vehicle, but before developing facts to connect either the driver or the passenger to the smell, the officer arrested both of them. After arresting the two, the officer discovered a pipe with marijuana in it and marijuana inside an ashtray, which the passenger claimed ownership of.

The driver was charged with possession of marijuana and drug paraphernalia, but the trial court suppressed the evidence on the grounds the general odor of marijuana did not create probable cause specific to the driver. The Supreme Court agreed and stated:

[12] *State v. George*, 146 Wash. App. 906, 920, 193 P.3d 693, 699 (2008)
[13] *State v. Grande*, 164 Wash. 2d 135, 145, 187 P.3d 248, 253 (2008)

> Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual. We cannot wait until the people we are associating with "alleviat[e] the suspicion" from us. Unless there is specific evidence pinpointing the crime on a person, that person has the right to their own privacy and constitutional protection against police searches and seizures.[14]

To interpret RCW 69.50.4013 as the Opinion purports would effectively overrule the holding of *Grande* and allow police to arrest the driver of vehicle simply because drugs may have been inside the car, even if all other evidence connects someone else to the drugs found inside the car.

Finally, this issue warrants review by this court to resolve a long-standing but pervasive line of cases from the lower courts that have struggled over the very issue we face here. At times, lower courts have adhered to the language and analysis of this Court in *Callahan* and the like. Both Division I and Division II of the Court of Appeals has agreed with this interpretation. In *Shumaker*, Division III held:

> To prove constructive possession of drugs, the State must show dominion and control over the drugs. Dominion and control over the premises where drugs are found is one circumstance to be considered by the trier of fact. Dominion and control of the premises does not, however, create an inference that the defendant had dominion and control over the drugs found on the premises.[15]

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[14] *Id.* at 145-46.
[15] *State v. Shumaker*, 142 Wn. App. 330, 331, 174 P.3d 1214 (2007)

Likewise, in *Cantabrana*, Division I held that the jury cannot find "constructive possession . . . solely upon evidence of dominion and control over premises where drugs are located."[16] But still, as noted in the comments to WPIC 50.03:

> Cases have been split as to whether dominion and control over the premises is by itself sufficient to constitute constructive possession of the controlled substance, or whether instead dominion and control over the premises is merely one factor to be considered along with all the other relevant circumstances.[17]

Given these inconsistent results, this case, more than most others is exactly the type of case that needs this Court's guidance.

B. MR. LONGSHORE'S COUNSEL WAS CLEARLY INEFFECTIVE UNDER *STRICKLAND* FOR FAILING TO ADVANCE MR. LONGSHORE'S BEST DEFENSE TO THE UNWITTING POSSESSION

Generally, reviewing courts will presume that defense counsel rendered constitutionally adequate performance.[18] However, the defendant can rebut this presumption, as Mr. Longshore did here, by showing that "his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound

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[16] *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572, 573 (1996)
[17] CPIC 50.03, Comments (citing *State v. Olivarez*, 63 Wn.App. 484, 820 P.2d 66 (1991) (Division III), *State v. Ponce*, 79 Wn.App. 651, 653 n.1, 904 P.2d 322 (1995) (Division III), *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997), and State v. Shumaker, 142 Wn.App. 330, 174 P.3d 1214 (2007)).
[18] *State v. McFarland*, 127 Wn.2d, 322, 335, 899 P.2d 1251 (1995).

strategy."[19] Mr. Longshore did just this by pointing out how his trial counsel refused to argue that unwitting possession, in addition to or in the alternative, a lack of possession no reasonable attorney who considered raising the defense, would have consciously decided against arguing it.

But the Opinion rejected this argument, providing the following reasons, without citations to fact or law: (1) by arguing unwitting possession, one necessarily "concedes possession," (2) lack of possession and unwitting possession are "incongruous" defenses, and (3) unsupported concerns about the different burdens of proof, [20] As discussed below, none of these concerns, however, justified the decision to not argue unwitting possession as an affirmative defense under the facts here.

1. To argue Unwitting Possession, a Defendant Does not Need to "Concede . . . Dominion and Control."

At the outset, the Opinion implies that defense counsel could not have argued unwitting possession without "conced[ing]" that Mr. Longshore had dominion and control over the drugs in the car. To the extent that the Opinion holds so much, it is incorrect.

To advance a successful unwitting possession defense, defense counsel need not actually admit to the jury that Mr. Longshore possessed the controlled substance. Instead, competent defense counsel would have

[19] *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89).
[20] Opinion at 14.

realized this, and crafted an argument accordingly, i.e. that the jury could acquit on two alternate, but completely consistent grounds: (a) lack of possession, or (b) lack of knowledge. Here, it appears that both the Court of Appeals, and perhaps defense counsel, failed to appreciate this fact, rendering trial counsel's performance deficient under Strickland.

2. Lack of Possession & Unwitting Possession are Not "Incongruous" Defenses in Most cases, Including this one.

The Opinion claims that counsel could have decided not to argue lack of knowledge because the defense was "incongruous" with the general denial defense claiming that "unwitting possession concedes the concept of dominion and control."[21] This claim is incorrect, and in fact, the opposite is true. The Supreme Court specifically created the unwitting possession defense for this exact situation, i.e. when the State has easily proved constructive possession but the facts suggest that the defendant may not have known he possessed that drug.[22] But its efforts mean nothing if defense counsel does not actually use the defense when the facts call for it. And that is exactly what happened here.

3. Though Unwitting Possession Puts the Burden on the Defendant to Prove Knowledge, Asserting that Defense is Not Unreasonable in a Simple Possession Case because it is the only way To Get the Issue of Knowledge Before the Jury.

[21] Opinion at 14.
[22] *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572, 573 (1996)

The Opinion claims that defense counsel could have rejected unwitting possession in light of two issues pertaining to the "burden of proof," neither of which are supported by case law, or the specific facts of this case. First, the Opinion theorizes that competent defense may have consciously decided against an unwitting possession defense to avoid "assuming the burden" of proving a lack of knowledge. But, assuming the burden of proof is only a concern when the State already carries the burden to prove knowing possession of contraband, such as those that charge possession with intent to distribute or unlawful possession of a firearm.[23] But, here, Mr. Longshore was charged with simply possession. Thus, there was no shifting of the burden of proving knowledge. The only way to get that issue before the jury is by requesting an unwitting possession instruction.

Second, the Opinion speculates that competent defense counsel may have decided against a advancing both defenses—no possession and, alternatively, unwitting possession—because doing so may "confus[ed] the jury" by presenting it with two "distinct burdens of proof." But, this logic, if accepted by other courts, could be applied to any defense in

[23] *State v. Carter*, 127 Wash.App. 713, 112 P.3d 561 (2005) (counsel rendered ineffective assistance for successfully requesting an unwitting possession instruction in an unlawful possession of a firearm prosecution because it unnecessarily shifted the burden of proving knowledge to the defense); *State v. Michael*, 160 Wash. App. 522, 527-28, 247 P.3d 842, 844 (2011) (counsel not ineffective for deciding not to propose an instruction like that proposed in *Carter*).

Washington that places the burden on the defense. Under this reasoning, for example, defense counsel could refuse to offer his clients best and most obvious defense to the charges simply because he is afraid that the jury would be "confused" by the law. Such a categorical excuse for defense counsel would be justified in rejecting a valid defense merely because he is worried that the jury will not understand the jury instructions.

More importantly, this reasoning is quite simply wrong. There is nothing confusing about instructing the jury on unwitting possession. The standard WPIC is quite clear on what the jury must find to acquit the defendant: (a) that Mr. Longshore did not know that the methamphetamine was in the vehicle, or (b) that he did not know it was methamphetamine. The standard instruction is very clear. It would be unreasonable for Mr. Longshore's defense attorney to find that such an instruction was warranted but to then decide not to offer it out of an unfounded fear that it might "confuse" the jury when it could result in an acquittal for his client.

In the end, no reasonable attorney would have rejected an opportunity to argue that Mr. Longshore should be acquitted because he did not know that drugs were in the car. The facts supported the defense and it was objectively his best opportunity to obtain an acquittal. Finally, no objective concerns—such as inconsistent defenses—would have

justified competent defense counsel from forgoing his client's best chance at an acquittal. Mr. Longshore's counsel was ineffective for failing to argue the defense and he is entitled to a new trial.

4. As in Many Prosecutions based Upon Constructive Possession, Unwitting Possession was Mr. Longshore's last and only Reliable Defense.

The Opinion implies that an unwitting possession defense was "unnecessary[]" for Mr. Longshore's defense, but completely fails to explain why.[24] But, if this court is correct that the State proved possession simply because Mr. Longshore was driving the car and the drugs were found near the driver, then Mr. Longshore was already guilty of possession as a matter of law. Competent defense counsel would have been aware of this and decided to also argue that Mr. Longshore's lack of knowledge also warranted an acquittal.

In fact, an unwitting possession defense was his best—if not his only—real defense with any chance of success. No evidence directly connected Mr. Longshore to the sock, the pipe, or the trance amounts of methamphetamine found inside them. Mr. Longshore did not ingest methamphetamine that day, and there was no evidence to suggest that he did. The drugs were not in plain view, but instead, they were only located in trace amounts, inside a pipe that was hidden inside a woman's sock

[24] Opinion at 14.

inside the vehicle.

In the end, no evidence, only two objective facts connect Mr. Longshore to the trace amounts of methamphetamine found in the vehicle: (1) the fact that Mr. Longshore was a recent driver of the car, and (2) mere proximity to the pipe wherein trace amounts of drugs were located. No other evidence, such as fingerprints on the pipe, suggested that Mr. Longshore had handled the drugs earlier that day. No other evidence, such as statements of ownership or a positive drug test, suggested that the pipe or the drugs belonged to Mr. Longshore.

Not only was an unwitting possession defense "necessary" to alleviate the harshness of the simple possession statute, it was objectively necessary for Mr. Longshore to overcome his legal guilt, which this court has admitted was proved by his mere driving and proximity to contraband. In fact, unwitting was Mr. Longshore's only objectively reasonable hope for an acquittal.

C. Ineffective Assistance for Failing to Assert a Claim of Self Defense to the Felony Harassment Charge.

In his SAG, Mr. Longshore argued that "his defense counsel rendered ineffective assistance . . . because he failed to assert self-defense to the charge of felony harassment."[25] This court rejected his argument. It held that defense counsel's decision to not "not argue that the threat was

[25] Opinion at 14, fn 3.

lawful . . . [was] a tactical decision" that this court could "not question" because "the State was still required to prove beyond a reasonable doubt that Longshore acted without lawful authority."[26] But what the Opinion failed to recognize the jury was never instructed on what "without lawful authority" actually means.[27] Defense counsel never proposed an instruction on it and never argued that Mr. Longshore's threat was lawful.

This failure constituted ineffective assistance of counsel. Reasonable conduct for an attorney includes carrying out the duty to research the relevant law, including the law pertaining to potentially viable defenses at trial.[28] Failure to offer an instruction which is warranted by the evidence, gives a complete and correct statement of the law, and would be helpful to the defense, may render counsel's performance deficient.[29]

In *State v. Kyllo*, Division II held that defense counsel rendered deficient performance when he failed to object to erroneous jury instructions that misstated the law on self-defense. In that case, Kyllo was charged with Second Degree Assault for biting another inmate's ear while in custody. At trial, Kyllo admitted to committing the assault, but he argued that he was acting in self-defense. Kyllo did not offer any

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[26] Opinion at 14, fn 3.
[27] This argument was advanced in Mr. Longshore's supplement briefing, but never addressed by the court.
[28] *Strickland*, 466 U.S. at 690-91; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).
[29] *State v. Thomas*, 109 Wn. 2d 222, 226-29, 743 P.2d 816 (1987).

instructions on self-defense. The State offered the instructions on self-defense, but it failed to offer the correct self-defense instructions. The State should have proposed instructions on self-defense by using non-deadly force.

Instead, the State proposed the much-easier-to-prove instruction on use of deadly force, which "incorrectly stated that Kyllo had to apprehend a greater degree of harm than is legally required before non-deadly force may be used in self-defense."[30] Had this case been one for homicide, this of course, would have been appropriate. But, it was not such a case. The instruction was therefore only inaccurate *as it applied to the facts of that particular case*.[31] Because the defense attorney failed to object to the instructions, or to provide the court with jury instructions that correctly described the law on self-defense for *non-deadly* force, the Court held that Kyllo's trial counsel rendered deficient performance.

Defense counsel's mistake in *Kyllo* is remarkably similar to the defense counsel's mistake here. Here, just as in *Kyllo*, defense counsel should have objected to the State's proposed jury instruction on lawful force. In *Kyllo*, the State proposed an instruction on deadly force, instead of proposing an instruction on non-deadly force (which imposes a higher

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[30] *Id.*

[31] *Kyllo*, 166 Wn.2d at 365 ("The jury instructions allowed the jury to apply an incorrect standard.").

burden on the State), but defense counsel failed to recognize the error and object to it.

Similarly, here, the State proposed an instruction on lawful force that was circular and failed to define how Mr. Longshore's threat could have been lawful. Mr. Longshore's threat could have been lawful, for example, to prevent any "offense against a person."[32] Unlawful imprisonment is a crime against person.[33] 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.[34]

In fact, to make himself aware of the viability of the defense of self and property, defense counsel needed to only read the WPIC on the very self-defense instruction that was given in this case, which only stated the law on self-defense, but not on defense of property. That WPIC instruction, titled "defense of self, others, property," makes it quite clear that defense of property would have been a viable and necessary defense here.[35]

This WPIC makes it unmistakably clear that Mr. Longshore could

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[32] 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."

[33] RCW 9.94A.411

[34] Under RCW 9A.16.020

[35] WPIC 17.02

threaten to use force in defense of himself, his companions, or his property. But defense counsel made no attempt to argue this theory to the jury or to propose an instruction on it that could have resulted in Mr. Longshore's acquittal. Counsel has a duty to object to instructions that ease the prosecution's burden of proof, even when it pertains to self-defense.[36]

But, here counsel neither objected to the instructions, nor did he propose his own instructions that could have allowed the jury to acquit Mr. Longshore. Competent counsel—who understands the law of self-defense as applied to these facts—could not have made a reasonable decision to not argue that Mr. Longshore was acting in self-defense when he made the threat after being unlawfully detained by non-police officers against his will.

V. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated November 4, 2014

Mitch Harrison
Attorney at Law

[36] *Kyllo*, 166 Wn.2d at 862 ("There was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law and eased the State of its proper burden of proof on self-defense.").

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this **Petition for Review** on the following persons in the manner indicated below:

Washington State Court of Appeals Division 1 600 University Street Seattle, WA 98101-4170	[ ] U.S. Mail [ ] Email: [X] Fax: 206.389.2613
Mason County Prosecuting Attorney PO Box 639 Shelton, WA 98584-0639	[X] U.S. Mail [ ] Email: [ ] Fax:
Charles Longshore, DOC #332121 Stafford Creek Correction Center 191 Constantine Way Aberdeen, WA 98520	[X] U.S. Mail [ ] Email: [ ] Fax:

DATED this 6th day of November, 2014 at Seattle, Washington.

Christopher Wieting
Law Clerk to Mitch Harrison

FAX

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NOTE:

[Corrected] Petition for Review, State v. Longshore, Case No.71644-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 71644-1-I
	)	
v.	)	UNPUBLISHED OPINION
	)	
CHARLES LONGSHORE,	)	
	)	
Appellant.	)	FILED: June 16, 2014
	)	

DWYER, J. — Charles Longshore led police on a high speed chase after he threatened to kill a man who had temporarily prevented Longshore from leaving a housing complex in Shelton, Washington. Once Longshore was apprehended, a search of the vehicle he was driving revealed a pipe containing methamphetamine residue. Subsequently, he was charged with felony harassment, attempting to elude a pursuing police vehicle, and unlawful possession of a controlled substance. At trial, the court determined that, if Longshore chose to testify, a security officer would be stationed at an exit near the witness stand during Longshore's testimony. Longshore did not testify and he was convicted on all counts.

On appeal, he raises a number of challenges to the trial court proceedings. He argues that his right to testify was violated, that no valid waiver of his right was secured, and that his counsel prevented him from testifying.

Additionally, he claims that his counsel was ineffective, and that the State failed to present sufficient evidence to convict him as to the harassment and the unlawful possession charges. None of his arguments persuade us that he is entitled to appellate relief. Accordingly, we affirm his convictions.

I

On March 25, 2012, Longshore arrived at the Firwood Gardens complex in Shelton, Washington. Longshore was driving a "goldish-beige" Dodge Intrepid, which had tinted windows and a small sticker with feathers on it. Although the vehicle was registered in someone else's name, Longshore had been seen driving the Intrepid into Firwood Gardens on more than one occasion.

Charles Aldridge, a resident of Firwood Gardens, had previously told Longshore not to return to the property, and Justin Elston, also a resident, indicated that Longshore had stolen property from Firwood Gardens residents. On this particular day, after Longshore again entered Firwood Gardens, Elston positioned his own vehicle in such a way so as to prevent Longshore from driving away. Elston did this in an effort to detain Longshore. The police were then called. In response to being blocked in, Longshore threatened Elston and other neighbors nearby, claiming that he had a gun and that he would kill every one of them and their families. He also made threatening gestures, including reaching into his pocket and into his vehicle. Fearing that Longshore would carry out his threats, Elston moved his own vehicle and allowed Longshore to drive away. At least one female passenger was in the Intrepid with Longshore when he left.

Officer Daniel Patton of the Shelton Police Department received a

dispatch regarding the Firwood Gardens incident. Shortly thereafter, Patton learned that a fellow officer had contacted or attempted to contact the Intrepid. Rather than stop, the Intrepid had eluded the officer and the officer was in pursuit. After listening to the radio traffic, Patton determined that the fleeing Intrepid could be headed for an intersection with which he was familiar. Patton drove to the intersection and placed spike strips on the street. However, after one of the pursuing officers mistakenly said that the Intrepid was traveling in the opposite direction, Patton removed the spike strips and placed them in his trunk. As soon as Patton had closed his trunk, the fleeing Intrepid drove by him with police cars in pursuit. However, as the Intrepid slowed to make a turn, Patton was able to recognize Longshore as the driver of the vehicle. Patton testified that he had "dealt with" Longshore in the past, involving "numerous contacts" with him.

Deputy Trevor Clark of the Mason County Sherriff's Office also identified Longshore during the pursuit. Clark was directly behind Longshore and was able to see Longshore's face in the rearview mirror of the Intrepid when Longshore slowed to make a turn.

Patton temporarily lost sight of the Intrepid during the pursuit, but again observed the vehicle and its driver some time later. This time, however, his observations "were not as good 'cause I'm physically in my vehicle, the vehicle's coming at me. And it was—it was rather quick, I just wasn't as close." Patton observed that the driver was now wearing some kind of dark hooded sweater or jacket. Patton's vehicle then became the lead police car in pursuit of the Intrepid.

However, as the pursuit entered a residential neighborhood where children were present, Patton slowed his patrol car to 30 miles per hour and turned off his lights and siren. Although the Intrepid did not slow down, Patton could see the direction in which it was headed.

A short time later, the police discovered the Intrepid at the end of a rural road. Longshore and two women were found near the car—hiding behind a shed—and were taken into custody.

A search of the Intrepid revealed a pipe containing unburned methamphetamine, which was found in a sock stuck between the driver's door and the driver's seat.

Patricia Peña, a passenger in the Intrepid, provided a different version of the events. She testified that after Longshore drove away from Firwood Gardens, they stopped at a store called Tozier's. She testified that they picked up Ty Cuzick—her ex-boyfriend at the time that she testified—in the Tozier's parking lot and that Cuzick climbed into the driver's seat, while Longshore moved to the front passenger seat. Peña claimed that Cuzick was driving the Intrepid during the period of time when it was being pursued by the police.

Glenn Probst, who lived near the area where the Intrepid stopped and where Longshore was apprehended, testified that he observed, from some distance away, the driver of the Intrepid—who was wearing a brown jacket—exit the vehicle and flee the scene. Probst further testified that a man in a white T-shirt exited the right front passenger-side door, along with two females who exited from the rear doors, and then all three were detained by the police. Probst

did not see the driver of the vehicle again.

Longshore was charged with felony harassment, attempting to elude a pursuing police vehicle, and unlawful possession of a controlled substance. During Longshore's jury trial, Officer Newell of the Mason County jail expressed a security concern that could arise in the event that Longshore decided to testify. In the particular courtroom in which the trial was taking place, there was an exit door behind the witness box and the witness box was only 4 or 5 feet away from the jury box. Based on the layout of the courtroom, Officer Newell wanted to place a security officer at the exit door. Longshore's attorney objected to this proposed arrangement, arguing that having a security officer posted "essentially next to" Longshore would be prejudicial. The prosecutor did not present any argument, instead deferring to the court. The court then stated the following on the record:

> The issue before the Court is what type of restraints—security should be on a defendant in a jury trial. This is a case that is an eluding, a harassment and a possession of a controlled substance. However Mr. Longshore is also held on another set of charges, which are aggravated murder.
>
> Currently, in this trial Mr. Longshore has been unrestrained at the table, but there has been the presence of three officers from the jail. . . .
>
> There has been a request made that if Mr. Longshore testifies that the officer then be placed behind him when Mr. Longshore is in the [witness] box. . . . When he's in the witness box, to put an officer behind him that is between him and the jury box.
>
> A court has to weigh the issue of whether or not the appearance of having an officer there would be prejudicial to the defense in that it makes it more apparent to the jury that Mr. Longshore is quote, in custody, for the purposes of how that would

> affect them in rendering—in deliberating on their verdict versus the need for security with an individual who, although this particular case involves an eluding, which is less serious, an eluding does mean a flight risk, because that's essentially what eluding is; you're eluding a police officer. So the Court has originally found probable cause to believe there's a reason Mr. Longshore would flee, that's what this charge is. In addition, there would also—there's also the other charges Mr. Longshore is being held on.

Longshore's counsel subsequently informed the trial court that Longshore would not testify: "Mr. Longshore and I have discussed his right to testify. He indicates that he . . . would prefer to testify, but on my advice will not testify." His counsel then invited the court to engage in a colloquy with Longshore on the record, but the court refused to do so. His counsel then stated, "I have made it clear to him that it is his right, and nobody—the Court, myself—nobody can take away that right. But on my advice, he will choose not to testify."

Following a jury trial, Longshore was convicted on all counts. He appeals.

II

Longshore first contends that his right to testify was violated. This violation occurred, he avers, when the trial court ruled that it would post a courtroom security officer at a door near the witness stand if Longshore testified. Longshore argues on appeal that this measure would have been inherently prejudicial. We disagree.

"[T]rial management decisions" are reviewed "for abuse of discretion." State v. Jaime, 168 Wn.2d 857, 865, 233 P.3d 554 (2010). "'A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury.'" Jaime, 168

Wn.2d at 865 (quoting State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)).

"'When a courtroom arrangement is challenged as inherently prejudicial, the question to be answered is whether an unacceptable risk is presented of impermissible factors coming into play.'" Jaime, 168 Wn.2d at 862 (quoting In re Pers. Restraint of Woods, 154 Wn.2d 400, 417, 114 P.3d 607 (2005)). "A courtroom practice might present an unacceptable risk of impermissible factors coming into play because of 'the wider range of inferences that a juror might reasonably draw' from the practice." Jaime, 168 Wn.2d at 862 (quoting Holbrook v. Flynn, 475 U.S. 560, 569, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)).

> In Holbrook, the Court considered whether the presence of security guards in the courtroom was inherently prejudicial. Id. at 568-69. Preliminarily, the Court did not focus its inquiry on the particular arrangement of the guards at Holbrook's trial. Id. Instead, it considered whether the presence of security guards *in general* was inherently prejudicial. Id. In concluding it was not, the Court found it significant that "[o]ur society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." Id. at 569.

Jaime, 168 Wn.2d at 863. However, the Holbrook Court did not foreclose the possibility that, under certain circumstances, deployment of security guards could violate a defendant's constitutional right to receive a fair trial: "In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate." 475 U.S. at 569.

In Holbrook, the respondent claimed that he was prejudiced by the placement of four uniformed state troopers in the first row of the courtroom's

spectator section at his trial. 475 U.S. at 570-71. The United States Supreme Court disagreed, concluding that, "we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section" and that "[f]our troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." Holbrook, 475 U.S. at 571.

Contrary to Longshore's contention, the guard's presence at the nearby door would not have been inherently prejudicial had Longshore testified. One security guard posted by a door would be unlikely to have been taken as a sign of anything other than a normal official concerned for the safety and order of the proceedings. This is particularly evident when, as in this case, three officers had already been present in the courtroom throughout the trial. Although Longshore expresses concern for the guard's placement between the witness stand and the jury box, the guard would have been set back at least several feet behind the witness stand and away from the jury box and, by all appearances, would have quite clearly been guarding the door. Inherent prejudice does not follow from such an arrangement.

Nevertheless, Longshore contends that the trial court was required to make a record of a compelling individualized threat posed by Longshore, meaning that there had to be "evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom." State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999).

Longshore's reliance on Finch is misplaced. The defendant in that case was shackled during the trial and sentencing, and such physical restraint during trial is inherently prejudicial. See, e.g., Jaime, 168 Wn.2d at 862 n.3. Where, as here, security measures are not inherently prejudicial, it is not incumbent upon the trial court to make a record of a compelling individualized threat. Given that Longshore was charged with eluding a police officer—as well as the murder charges in a different case—which tended to show that Longshore was a flight risk and that he was not a person who obeys court orders,[1] the trial court exercised its discretion judiciously.[2]

III

Longshore next contends that the trial court failed to complete its basic responsibility to determine that Longshore validly waived his right to testify. This failure occurred, Longshore avers, when the trial court refused to engage in a colloquy with Longshore to determine whether he had voluntarily waived his right to testify. We disagree.

Our Supreme Court has held that the United States Constitution imposes no obligation on trial judges to inform defendants of the right to testify. State v.

[1] The court order being that he not engage in any criminal behavior while on release awaiting trial.

[2] Longshore's contention that the court should have considered viable alternatives is unavailing. As an initial matter, the trial court exercised its discretion, meaning that regardless of whether viable alternatives existed, we will not question its selection of one of those alternatives. Moreover, the alternatives suggested by Longshore, which included hidden restraints, electrical belt devices, or locking the exit door near the witness stand, must only be considered before ordering physical restraints. State v. Thompson, 169 Wn. App. 436, 470, 290 P.3d 996 (2012), review denied, 176 Wn.2d 1023 (2013). The thrust of this requirement is, again, tethered to the notion that inherently prejudicial security measures must be imposed only after adhering to a well-delineated procedure. There was no inherent prejudice from the security measure imposed here. Thus, the trial court did not need to adhere to the procedure outlined in cases such as Jaime and Finch.

Thomas, 128 Wn.2d 553, 558-59, 910 P.2d 475 (1996). Furthermore, although "the waiver of the right to testify must be knowing," it does not follow "that the trial court must obtain an on-the-record waiver of the right." Thomas, 128 Wn.2d at 559. "[A] defendant is not deprived of his constitutional right to testify merely because the trial court does not inform him of the existence of that right—it is the responsibility of defense counsel to inform the defendant of the right to testify." State v. O'Cain, 169 Wn. App. 228, 244, 279 P.3d 926 (2012). Moreover, "there is no requirement of a colloquy on the record to protect the state constitutional right to testify in one's behalf." State v. Russ, 93 Wn. App. 241, 243, 969 P.2d 106 (1998).

In essence, Longshore argues that his counsel's invitation to the trial court to engage in a colloquy with Longshore precluded it from presuming that Longshore had voluntarily waived his right. However, Longshore's counsel explicitly represented to the trial court that it was made clear to Longshore that only he could waive his right to testify and that Longshore—on the advice of his counsel—had, in fact, waived that right.

> Mr. Longshore and I have discussed his right to testify. He indicates that . . . he would prefer to testify, but on my advice will not testify. And if the Court wishes to engage in a colloquy with him to ensure that it's knowingly, voluntarily and intentionally—decision was made under those circumstances, I would invite that to complete the record. . . .
>
> And I have made it clear to him that it is his right, and nobody—the Court, myself—nobody can take away that right. But on my advice, he will choose not to testify.

Defense counsel's invitation to engage in a colloquy with Longshore does

not cast doubt upon the voluntariness of Longshore's waiver. The requirement of voluntariness is meant to thwart coercion, not to enshrine the initial preferences of criminal defendants. Although Longshore's preference may have been to testify on his own behalf, after conferring with his counsel, he voluntarily waived that right. Thomas requires no further inquiry. Indeed, Thomas cautions against engaging in a colloquy with the defendant, explaining that it "might have the undesirable effect of influencing the defendant's decision not to testify." 128 Wn.2d at 560. "As a result, courts rely upon defense counsel to inform the defendant of his constitutional right to testify." Thomas, 128 Wn.2d at 560. Here, defense counsel quite clearly did inform Longshore of his right to testify. Hence, the trial court acted prudently by refusing to engage in a colloquy with Longshore.

IV

Longshore next contends that his counsel prevented him from testifying and asks either that a reference hearing be held or a new trial be ordered. However, he fails to present substantial factual evidence to support his claim and, thus, his contention is unavailing.

> After trial, a silent defendant may assert a claim that his attorney prevented him from testifying. See [In re Pers. Restraint of] Lord, 123 Wn.2d [296,] 317 [868 P.2d 835 (1994)]; accord Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991); contra United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (holding that the defendant "can not now approach the court and complain of the result of his decision"). The defendant must, however, produce more than a bare assertion that the right was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action. Accord Underwood, 939 F.2d at 476 (rejecting a claim in which a defendant failed to produce more than "a bare, unsubstantiated, thoroughly self-serving, and none too plausible statement that his lawyer (in

violation of professional standards) forbade him to take the stand"). Thomas, 128 Wn.2d at 561.

In Thomas, our Supreme Court concluded that when the defendant was present during the court's questioning of defense counsel and where his counsel claimed that he had discussed the choice with the defendant and had informed him that it was the defendant's decision, the defendant's failure to provide any factual evidence that his counsel had prevented him from testifying precluded him from obtaining relief. 128 Wn.2d at 561. As in Thomas, Longshore was present when his counsel told the court that counsel had discussed the choice with Longshore and had informed him that it was his decision. As in Thomas, there is no indication from the record that Longshore disagreed with his counsel or that he attempted to assert his right to testify. Moreover, Longshore's averment on appeal that he was prevented from testifying is unsubstantiated. He argues that his trial counsel's declaration in support of the motion for a new trial substantiates his claim; however, that declaration merely states that Longshore chose not to testify. It does not corroborate Longshore's version of events. Longshore is not entitled to a reference hearing or to a new trial.

IV

Longshore next contends that his trial counsel rendered ineffective assistance. This occurred, he asserts, when his counsel refused the trial court's offer of an "unwitting possession" jury instruction. We disagree.

"In order to prevail on a claim of ineffective assistance of counsel," Longshore "must demonstrate (1) deficient performance, that his attorney's

representation fell below the standard of reasonableness, and (2) resulting prejudice that, but for the deficient performance, the result would have been different." State v. Hassan, 151 Wn. App. 209, 216-17, 211 P.3d 441 (2009) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "In evaluating an ineffective assistance of counsel claim, this court "must begin with 'a strong presumption counsel's representation was effective' and must base its determination on the record below." In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). "The defendant alleging ineffective assistance of counsel 'must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" Hutchinson, 147 Wn.2d at 206 (quoting McFarland, 127 Wn.2d at 336). "[D]eliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

"The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession." State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). "Defendants then can prove the affirmative defense of unwitting possession." Bradshaw, 152 Wn.2d at 538. Defendants have the burden to prove by a preponderance of the evidence that the controlled substance was possessed unwittingly. State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994).

A review of the record indicates that defense counsel's decision not to accept an unwitting possession instruction was a legitimate trial tactic. Longshore's theory at trial was that he was not the owner or the driver of the Intrepid. Had his counsel elected to include an unwitting possession instruction, the affirmative defense would have been incongruous with his other theory—unwitting possession concedes the concept of dominion and control, which is what Longshore argued he did not exercise over the Intrepid. By pursuing a theory based on unwitting possession, Longshore would have unnecessarily risked confusing the jury with distinct burdens of proof and would have caused him to assume a burden of proof, rather than forcing the State to meet its burden. Longshore's defense counsel's tactical decision to put the State to its burden of proving possession was reasonable and his performance, therefore, was not deficient.[3]

V

Longshore next contends that the State failed to present sufficient evidence to support his conviction of felony harassment. This is so, he avers, because the State failed to prove beyond a reasonable doubt that he threatened

[3] In a statement of additional grounds (SAG), Longshore argues that his defense counsel rendered ineffective assistance. This is so, he asserts, because counsel failed to assert self-defense to the charge of felony harassment but went on to argue the lawful authority of that threat. Longshore's assertion is unavailing. A review of the record reveals that his counsel did not argue that the threat was lawfully made. Instead, counsel argued that the State had failed to prove beyond a reasonable doubt that a credible threat had been made. We do not question defense counsel's tactical decision to pursue this theory, particularly given that the State was required to prove beyond a reasonable doubt that Longshore acted without lawful authority.

Justin Elston[4] without lawful authority.[5] We disagree.

"'It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt.'" State v. Williams, 136 Wn. App. 486, 492-93, 150 P.3d 111 (2007) (quoting State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). "If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt." State v. Lively, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996); see also State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) ("[T]he State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction.").

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

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[4] Longshore also claims that insufficient evidence was presented that he threatened "Aldridge," presumably referring to Charles and Judith Aldridge. However, the State did not charge Longshore with harassment toward the Aldridges and the jury instructions made no mention of them.

[5] Longshore asserts that the trial court's definition of "without lawful authority" contained within the jury instructions failed to give the jury any guidance as to how the State could prove that element. This error, he claims, denied him due process of law. However, because this claim of error was not presented to the trial court and because any possible error would not be of constitutional magnitude, we do not consider it on appeal. "As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude." State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992); see also RAP 2.5(a).

"Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The State charged Longshore with one count of felony harassment, alleging that Longshore

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

With respect to the harassment charge, the jury was instructed as follows:

> A person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person, and when he or she, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person.

Jury Instruction 11. The jury was further instructed that "[a] person acts without lawful authority when that person's acts are not authorized by law." Jury Instruction 14.

Longshore avers that the State's evidence was insufficient to establish that he acted without lawful authority because Elston could have been charged with unlawful imprisonment, and Longshore's use of force was reasonable. Without deciding whether Longshore is correct in his contention that Elston could have been charged with unlawful imprisonment, the record indicates quite clearly

that the degree of force used by Elston to prevent Longshore from driving away was minimal. He made no attempt to physically harm Longshore or any of Longshore's property. Nevertheless, Longshore threatened to kill Elston if he did not move his vehicle.

"[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). "Deadly force may be used only in self-defense if the defendant reasonably believes he or she is threatened with death 'or great personal injury.'" Walden, 131 Wn.2d at 474 (quoting 13A ROYCE A. FERGUSON, JR. & SETH AARON FINE, WASHINGTON PRACTICE: CRIMINAL LAW § 2604, at 351 (1990)). "Threats of bodily injury also lawfully may be made when circumstances justify violent action in self-defense." State v. Smith, 111 Wn.2d 1, 9, 759 P.2d 372 (1988).

Longshore's threat was not authorized by law. Elston made no attempt to harm Longshore's person or property and gave no reason for Longshore to react as he did. Longshore's response to Elston's maneuver that blocked his vehicle was disproportionate and unreasonable. It was not a harmless "ruse," as he attempts to characterize it on appeal. The evidence was that Longshore threatened to kill Elston and reached into his car as if he was getting a gun. Sufficient evidence was admitted at trial to establish beyond a reasonable doubt that Longshore acted without lawful authority. Hence, we grant no appellate

relief to Longshore with respect to his felony harassment conviction.[6]

VI

Longshore next contends that the State presented insufficient evidence to support his conviction of unlawful possession of a controlled substance. This is so, he asserts, because insufficient evidence was presented that he exercised dominion and control over the Intrepid in which the controlled substance was discovered. We disagree.

As observed, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. "Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." Carver, 113 Wn.2d at 604.

"Possession . . . may be either actual or constructive." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession of drugs requires that a person exercise dominion and control over the drugs or the premises where the drugs are found. Callahan, 77 Wn.2d at 29-30; see also State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008) ("An automobile

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[6] In a SAG, Longshore contends that the State presented insufficient evidence to support his felony harassment conviction. This is so, he avers, because the State did not present evidence that the victim was placed in reasonable fear that Longshore's threat would actually be carried out.

"In order to convict an individual of felony harassment based upon a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense." State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003). The State offered evidence that Longshore threatened Elston and neighbors nearby, claiming that he had a gun and that he would kill every one of them and their families. He also made threatening gestures, including reaching into his pocket and into his vehicle. This evidence was sufficient to establish a reasonable fear that Longshore would carry out his threats. No appellate relief is warranted.

may be considered a 'premises.'"). Proximity alone, without proof of dominion and control, is insufficient to establish possession. State v. Raleigh, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010).

In support of his contention, Longshore argues that he "did not own the vehicle in which the drugs were found" and that "the record indicated that Mr. Cuzick was both the driver and owner of the Dodge." Conflicting evidence was presented on these points during the trial. Given that Longshore challenges the sufficiency of the evidence, our review credits the truth of the State's evidence.

The State offered testimony that Longshore was the driver of the Intrepid during the police pursuit and that Longshore had been seen driving the Intrepid before the pursuit, suggesting that he had been in possession of the vehicle for some time. Furthermore, the State offered testimony that methamphetamine was found between the driver's seat and the driver's door. The evidence offered by the State was sufficient to establish that Longshore exercised dominion and control over the vehicle in which the methamphetamine was found.[7] Longshore's contentions to the contrary go to the weight of the evidence. No appellate relief is warranted.

VII

Longshore makes several contentions that were not made by his attorney on appeal. However, they are unavailing.

Longshore first contends that he was denied due process of law. This is

[7] In a SAG, Longshore also argues that the State presented insufficient evidence that he exercised dominion and control. We reject his duplicative argument.

so, he contends, because a probable cause determination as to the count of felony eluding was not made within 48 hours after arrest or at any point before trial. Review of the transcript reveals that the trial court did find probable cause as to the count of eluding prior to Longshore's trial, and that probable cause was found as to the felony harassment count within 48 hours of Longshore's arrest, thus authorizing his continued detention, subject to conditions of release. See CrR 3.2. Longshore's contention does not provide a basis for appellate relief.

Longshore next contends that prosecutorial misconduct occurred during closing statements. This occurred, he argues, when the prosecutor improperly commented on the defense's failure to question Patricia Peña regarding the felony harassment charge, thereby shifting the burden of proof. Although Longshore does not cite to the record, presumably he is referring to the prosecutor's following statement made during rebuttal: "You'll notice that [defense] counsel skipped over when she was on the stand what happened during the harassment. She was never asked about that, even though she was there." Longshore did not object to this statement.

"In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). If the defendant fails to object at trial, complained of error is waived unless the defendant "establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice." Glasmann, 175 Wn.2d at

704.

"Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct." Glasmann, 175 Wn.2d at 713. "Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." Glasmann, 175 Wn.2d at 713.

The prosecutor's comment here was not improper. He observed that defense counsel did not question Peña about the incident upon which the felony harassment charge was based. However, the prosecutor did not improperly argue or imply that this failure to question was a basis for the jury to convict on that count. No prosecutorial misconduct occurred. Even if it had, a timely objection and curative instruction would have cured any prejudice. Glasmann, 175 Wn.2d at 704.

Affirmed.

We concur: