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NO. 54348-6-II

THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DAVID SMALLEY,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

CHRISTOPHER PETRONI  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

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## A. INTRODUCTION

After Appellant David Smalley accidentally stabbed his old acquaintance Xavier Chambers, the State charged him with first-degree assault. While Mr. Smalley was in jail awaiting trial, a friend on the outside told Mr. Smalley that Mr. Chambers was telling “everybody” he did not believe Mr. Smalley stabbed him on purpose. To support his defense that the stabbing was an accident, Mr. Smalley requested that his friend ask Mr. Chambers whether he would be willing to sign a statement to that effect.

After a bench trial, the trial court rejected Mr. Smalley’s defense of accident and found he intentionally assaulted Mr. Chambers. Absent any evidence Mr. Smalley ever learned Mr. Chambers did not truly believe the stabbing was an accident, the court found that Mr. Smalley attempted to induce Mr. Chambers to testify falsely, and was therefore guilty of witness tampering. In doing so, the court effectively punished Mr. Smalley for the innocent and constitutionally protected conduct of building a defense.

## B. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports Mr. Smalley's conviction of witness tampering.
2. The information was deficient for failure to allege all essential elements of the offense of unlawful possession of a controlled substance.
3. The information was deficient for failure to allege all essential elements of the offense of first- or second-degree assault.
4. The trial court erred in entering finding of fact 33.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

Smalley was aware Mr. Chambers did not believe the stabbing was an accident, does insufficient evidence support Mr. Smalley's conviction of witness tampering?

2. Courts assume that the Legislature does not intend to enact unjust statutes. Accordingly, though the statute defining unlawful possession of a controlled substance has no express mental element, the possibility of criminalizing innocent conduct demonstrates clear legislative intent to require knowing possession. Where the information did not allege that Mr. Smalley knowingly possessed a controlled substance, did Mr. Smalley receive constitutionally inadequate notice?

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

4. The trial court found Mr. Smalley indigent and stated its intent to waive all non-mandatory legal financial

obligations. Nonetheless, the judgment and sentence requires payment of supervision fees as a condition of community custody. Should this Court remand with instructions to strike the community custody supervision fees?

#### D. STATEMENT OF THE CASE

For nearly ten years, Mr. Smalley worked as a confidential informant for the Lakewood Police Department. RP 248. He met Mr. Chambers in 2016 in connection with this work. RP 66–67; 378.

After a year or two without having seen him, in early March 2019, Mr. Smalley bumped into Mr. Chambers at a gas station near Mr. Smalley’s home in Lakewood. RP 68, 379. Mr. Smalley invited Mr. Chambers to visit his house. RP 68, 380. Mr. Chambers took Mr. Smalley up on his invitation. RP 159–60; RP 381. They chatted in Mr. Smalley’s garage, and Mr. Smalley gave Mr. Chambers, who was homeless, a change of clothes. RP 98; 159–60; RP 381–82.

At around mid-day on March 5, Mr. Chambers visited Mr. Smalley’s garage again. RP 69–70, 383. Mr. Chambers

asked if he could borrow a bicycle or some money for bus fare. RP 70, 384. Mr. Smalley gave him some cash. RP 73, 384. Mr. Chambers then asked for some methamphetamine, and Mr. Smalley gave him a small piece. RP 74–75, 384, 388. Offended by a perceived slight, Mr. Chambers dropped the methamphetamine on the garage floor and crushed it under his foot. RP 77, 130, 389.

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

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

Lakewood police officers arrested Mr. Smalley and served a search warrant at his home on March 6. CP 52 FF 21. An officer found methamphetamine and glass pipes on Mr. Smalley during a search incident to arrest. RP 223–24.

The State charged Mr. Smalley with first-degree assault, witness tampering, and possession of a controlled substance. CP 6–7. The witness tampering charge was based on a series of phone calls Mr. Smalley placed from jail to a

friend named McKenna Melton<sup>1</sup> between April 5 and April 23, 2019. RP 269; CP 24–25; Ex. 6A.

On April 7, Ms. Melton told Mr. Smalley that Mr. Chambers “told everybody” that Mr. Smalley did not stab him “on purpose.” RP 271–72; Ex. 3<sup>2</sup> at 5, 8, 18; Ex. 6A, <sup>3</sup> 4/7/19 at 1:10–1:19, 3:44–4:04, 9:27–9:40. Relieved, Mr. Smalley repeated a request he had made to Ms. Melton during a call the previous day, to approach Mr. Chambers and ask whether he would be willing to sign a statement that the stabbing was an accident. RP 271; Ex. 3 at 1–3, 7–8, 18–19; Ex. 6A, 4/6/19, at 0:32–1:22, 4/7/19 at 3:05–3:31, 9:40–9:58.

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<sup>1</sup> In the record, Ms. Melton’s name is variously spelled “Melton” and “Milton.” *E.g.*, RP 109, 269. Mr. Smalley has adopted the spelling the trial court used in its written findings. *See* CP 54 FF 31.

<sup>2</sup> Exhibit 3, a transcript of the jail call recordings the State introduced, was not admitted at trial. Mr. Smalley cites it alongside the recordings themselves for the Court’s ease of reference.

<sup>3</sup> Exhibit 6A contains recordings of eight jail phone calls. The exhibit contains duplicate copies of some of the recordings.

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

The trial court acquitted Mr. Smalley of first-degree assault and found him guilty of second-degree assault instead. RP 474–75; CP 53 FF 28, 56 CL 7. The court also found that Mr. Smalley was armed with a deadly weapon. CP 56 CL 7. As for witness tampering, the court found that Mr. Smalley attempted to induce Mr. Chambers to “testify falsely” based solely on the court’s post-trial finding that the stabbing was intentional rather than accidental. RP 476; CP 54 FF 33, 56 CL 8. The trial court also found Mr. Smalley guilty of unlawful possession of a controlled substance. CP 56 CL 9.

Mr. Smalley received a total sentence of 29 months plus 18 months of community custody. CP 35. The court found

Mr. Smalley indigent and waived all non-mandatory legal financial obligations. RP 490; CP 33. Nonetheless, the court’s form judgment and sentence required Mr. Smalley to pay community custody supervision fees. CP 35, 40.

#### E. ARGUMENT

1. **The State presented insufficient evidence that Mr. Smalley attempted to induce Mr. Chambers to “testify falsely,” as required to prove witness tampering.**

“The State bears the burden of proving all the elements of an offense beyond a reasonable doubt.” *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing, e.g., Const. art. I, § 3). This Court may affirm a conviction only if, viewed in the light most favorable to the State, the evidence permits a rational factfinder to find beyond a reasonable doubt all essential elements of the offense. *State v. Johnson*, 188 Wn.2d 742, 750–51, 399 P.3d 507 (2017) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). All inferences drawn “must be reasonable and cannot be based on speculation.” *Rich*, 184 Wn.2d at 903 (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

To convict Mr. Smalley of witness tampering as charged, the State had to prove (1) Mr. Chambers was a witness or was “about to be called as a witness” in an official proceeding; (2) Mr. Smalley knew or had “reason to believe” this fact; and (3) Mr. Smalley attempted to induce Mr. Chambers to “[t]estify falsely.” RCW 9A.72.120(1)(a); *State v. Stroh*, 91 Wn.2d 580, 585–86, 588 P.2d 1182 (1979). In determining whether statements to a witness or third person amount to tampering, courts consider both the “literal meaning” of the alleged words and their “inferential meaning” in context. *State v. Rempel*, 114 Wn.2d 77, 83–84, 785 P.2d 1134 (1990).

*a. The State presented no evidence that Mr. Smalley attempted to induce Mr. Chambers to make an untrue statement.*

Mr. Smalley undeniably attempted to induce Mr. Chambers to testify—he wanted Mr. Chambers to sign a notarized statement, Ex. 3 at 1–2, 18–19—but the State presented no evidence Mr. Smalley wanted Mr. Chambers to testify “falsely.” On April 7, Ms. Melton informed Mr.

Smalley that Mr. Chambers “told everybody” Mr. Smalley did not stab him “on purpose.” Ex. 3 at 5, 8, 18; Ex. 6A, 4/7/19 at 1:10–1:19, 3:44–4:04, 9:27–9:40. Throughout the jail calls admitted by the trial court, neither Ms. Melton nor Mr. Smalley ever indicate awareness that Mr. Chambers believed Mr. Smalley stabbed him intentionally. Ex. 6A.

Courts find sufficient evidence to prove witness tampering where the defendant pressured a witness to change or recant a prior statement. For example, in *State v. Lubers*, 81 Wn. App. 614, 915 P.2d 1157 (1996), the defendant asked a witness to “write a letter recanting information that [the witness] had given the police.” *Id.* at 622. And in *State v. Williamson*, 131 Wn. App. 1, 86 P.3d 1221 (2004), the defendant told a child witness that her parents “are going to jail if you don’t recant your statement, take it back.” *Id.* at 5–6; *see also State v. Hurley*, No. 72545-9-I, 2016 WL 785546, at \*4 (Wash. App. Feb. 29, 2016) (unpub.) (defendant asked victim to “change her statement”); *State v. Brown*, No. 67676-8-I, 2013 WL 811740, at \*3–4 (Wash. App. Mar. 4, 2013)

(unpub.) (defendant wanted victim to “tell the prosecutor that she lied”); GR 14.1(a). In each of these cases, the defendant’s awareness that the witness had already made a statement showed the defendant wanted the witness to tell a lie. *E.g.*, *Williamson*, 131 Wn. App. at 5–6.

On the other hand, where the defendant’s words cannot reasonably be understood as an attempt to prevent the witness from testifying truthfully, they do not prove witness tampering. *See Rempel*, 114 Wn.2d at 83–84. In *Rempel*, during a call from jail, the defendant apologized to the alleged victim, said the criminal case “was going to ruin his life,” and asked the alleged victim to “drop the charges.” *Id.* at 83. The defendant’s “literal words,” the Supreme Court reasoned, did “not contain a request to withhold testimony”; rather, they reflected the popular misconception that a crime victim can cause a prosecution to be dismissed. *Id.* Nor did the surrounding context show an attempt to induce false testimony or prevent testimony altogether, as the defendant’s calls did not make the victim feel threatened. *Id.* at 84.

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

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

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

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

Smalley wanted Mr. Chambers to say, truthfully, that the stabbing was an accident. *See Rempel*, 114 Wn.2d at 83–84.<sup>4</sup>

*b. The trial court’s finding that Mr. Smalley attempted to induce false testimony based solely on its post-trial finding that the incident was not an accident rests on an untenable reading of the statute.*

Though RCW 9A.72.120 does not include a mental element on its face, the Supreme Court has read a mental element into it where necessary to prevent it from sweeping in innocent conduct. *See Stroh*, 91 Wn.2d at 585–86. In *Stroh*, the defendant argued that the statute would violate due process unless read to require “intent to obstruct justice.” *Id.* at 582–83. The Court rejected this argument. *Id.* at 583. Nonetheless, the Court held that the statute “implicitly if not expressly” requires that the defendant knew or had reason to

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<sup>4</sup> In denying Mr. Smalley’s halftime motion to dismiss, the trial court held sufficient evidence supported the charge because Mr. Smalley remarked that he did not want to be charged with witness tampering. RP 376–77; *see* Ex. 3 at 7, 16; Ex. 6A, 4/7/19 at 2:55–2:58, 8:41–8:44. But Mr. Smalley’s remarks show only that he knew about the crime of witness tampering; they cannot demonstrate an attempt to induce false testimony absent evidence that the testimony Mr. Smalley attempted to induce was false.

believe the victim is a witness. *Id.* at 585–86. Such a requirement was necessary, the court reasoned, to ensure that no one “innocent of the intent to obstruct justice” would be convicted, on “the assumption that the legislature did not intend to enact an unjust law.” *Id.*

*Stroh* resolved whether the defendant must know that the witness is or will be a witness, but not whether RCW 9A.72.120 requires a mental state for an attempt to induce a witness to “[t]estify falsely.” Thankfully, *Stroh’s* reasoning points the way forward. Knowledge that the testimony would be false is required, because otherwise the statute would punish innocent, and constitutionally protected, conduct.

*Stroh*, 91 Wn.2d at 585–86.

The due process clauses guarantee a defendant’s right to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This includes the right to look for evidence and witnesses that support the accused’s “version of the facts.” *Washington v. Texas*, 388

U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). If the accused were guilty of witness tampering every time a witness's desired testimony turned out to be untrue, regardless of what the defendant knew when asking the witness to testify, the right to present evidence in defense would be unreasonably hobbled. A requirement of knowledge that the sought testimony is false is necessary to prevent RCW 9A.72.120 from punishing this innocent conduct and becoming an "unjust law." *See Stroh*, 91 Wn.2d at 585–86.

In addition, the statute's use of the word "attempt" implies legislative intent to require knowledge of the testimony's falsity. RCW 9A.72.120. By definition, an "attempt" to do something is an act carried out with intent to achieve that end. *Attempt*, Black's Law Dictionary (11th ed. 2019). Consistent with this principle, the crime of attempt requires "intent to commit" the underlying crime attempted. RCW 9A.28.020(1); *see Williamson*, 131 Wn. App. at 6 (likening witness tampering to the crime of attempt). By proscribing an "attempt" to induce false testimony, the

Legislature signaled its intent to require at least that the defendant knew the testimony would be false.

Here, the trial court found Mr. Smalley “attempt[ed] to induce Mr. Chambers to testify falsely” based solely on its post-trial finding that the stabbing was intentional rather than accidental. RP 476; CP 54 FF 33. The court entered no findings concerning whether Mr. Smalley knew Mr. Chambers believed the stabbing was not an accident. *Id.* Unless Mr. Smalley knew Mr. Chambers would be lying if he signed the desired statement, a guilty verdict punishes Mr. Smalley for the innocent act of seeking evidence to support his defense that the stabbing was accidental. The Legislature cannot have intended this result. *See Stroh*, 91 Wn.2d at 585–86.

*c. The conviction of witness tampering must be reversed.*

The State presented insufficient evidence to prove an essential element of the offense: that Mr. Smalley attempted to induce Mr. Chambers to “[t]estify falsely.” RCW 9A.72.120(1)(a). The trial court’s contrary conclusion was

based on an untenable reading of the statute, finding Mr. Smalley guilty of inducing false testimony absent any evidence Mr. Smalley knew the testimony he attempted to induce was false. *See Stroh*, 91 Wn.2d at 585–86. The conviction of witness tampering must be reversed.

**2. Count III of the information—alleging possession of a controlled substance—was deficient for failure to allege knowledge.**

“Accused persons have the constitutional right to know the charges against them.” *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019) (citing U.S. Const. amend. VI; Const. art. I, § 22). The charging document must “adequately identify[]” each offense charged and allege facts supporting each essential element. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (quoting *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). This “essential element rule” ensures that the defendant receives notice of what the State intends to prove and permits the preparation of a defense. *Pry*, 194 Wn.2d at 752 (citing *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). The remedy for a deficient information

is dismissal without prejudice. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

*a. Possession of a controlled substance requires proof of knowledge to avoid punishing innocent conduct.*

The Legislature’s failure to explicitly include a mental element in a statutory definition of a crime does not alone demonstrate intent to establish a strict liability offense. *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). In general, courts assume that “the legislature did not intend to enact an unjust law.” *Stroh*, 91 Wn.2d at 585. Accordingly, courts routinely read a mental element into a criminal statute where necessary to avoid punishing innocent conduct. *Anderson*, 141 Wn.2d at 364; *Stroh*, 91 Wn.2d at 585–86.

The statute defining the offense of possessing a controlled substance does not set forth an explicit mental element. RCW 69.50.4013(1). However, an implied element of knowledge is unquestionably necessary to avoid sweeping innocent conduct into the statute’s ambit. Otherwise, the statute would apply to anyone with dominion and control over a place or item that happens to contain a controlled

substance—a rental car, a recently purchased home, a secondhand article of clothing—whether or not the person knew the controlled substance was there. *See Anderson*, 141 Wn.2d at 364 (possibility of punishing innocent conduct requires a mental element for possession of a firearm).

The Supreme Court has previously held that knowledge is not an essential element of possession of a controlled substance. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). However, the Court recently granted review and heard oral argument on this precise issue. *State v. Blake*, 194 Wn.2d 1023, 1023, 456 P.3d 395 (2020); *see* Pet.'s Supp. Br. at 1–2, *State v. Blake*, No. 96873-0 (Wash. Mar. 2, 2020), <https://www.courts.wa.gov/content/Briefs/A08/968730%20Pet'r's%20Supp%20Brief.pdf>. Should the Court issue a decision before this appeal is resolved, and conclude that knowledge is an essential element of the offense, that conclusion will apply to this case. *See State v. Hanson*, 151 Wn.2d 783, 784, 91

P.3d 888 (2004) (holding new interpretation of felony murder statute applied to cases still pending on direct review).

*b. Count III failed to allege that Mr. Smalley possessed a controlled substance knowingly.*

Where challenged for the first time on appeal, a reviewing court reads the information liberally—it is sufficient only if the requisite allegations either appear or “by fair construction may be found” on its face. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing *Kjorsvik*, 117 Wn.2d at 105). If so, the court asks whether the information’s language caused actual prejudice. *Pry*, 194 Wn.2d at 752–53 (citing *Kjorsvik*, 117 Wn.2d at 105–06). If not, the information is deficient and must be dismissed—even “the most liberal reading cannot cure it.” *McCarty*, 140 Wn.2d at 425 (quoting *State v. Moavensadeh*, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998)). The information must be read “according to common sense.” *State v. Sullivan*, 196 Wn. App. 314, 323, 382 P.3d 736 (2016) (quoting *Kjorsvik*, 117 Wn.2d at 109).

As noted, RCW 69.50.4013(1) must be read to include knowledge as an essential element of possession of a

controlled substance. Under the essential elements rule, the information therefore was required to allege that Mr. Smalley knew he possessed a controlled substance on the date in question. *Kjorsvik*, 117 Wn.2d at 98. The information contains no such allegation. CP 7. Accordingly, even under a liberal reading, the information is deficient and must be dismissed. *McCarty*, 140 Wn.2d at 425.

The State may argue the information's allegation that Mr. Smalley possessed a controlled substance "unlawfully and feloniously," CP 7, is an adequate substitute because courts have occasionally held the phrase "equivalent to the term 'knowingly,'" *State v. Snapp*, 119 Wn. App. 614, 621, 82 P.3d 252 (2004) (citing, e.g., *State v. Krajewski*, 104 Wn. App. 377, 386, 16 P.3d 69 (2001)). This argument fails.

First, these opinions derive from cases decided decades before Washington enacted its current criminal code. *See Krajewski*, 104 Wn. App. at 385–86 (citing *State v. Nieblas-Duarte*, 55 Wn. App. 376, 380–82, 777 P.2d 583 (1989) (citing *State v. Reynolds*, 229 Or. 167, 366 P.2d 524, 526 (1961));

*State v. Smith*, 31 Wash. 245, 248, 71 P. 767 (1903)); Laws of 1975 1st Ex. S. ch. 260 (enacting new section 9A.08.010). For the last 45 years, Washington law has recognized only four mental states—“unlawfully and feloniously” is not one of them. RCW 9A.08.010.

Second, opinions upholding charging documents with the phrase “unlawfully and feloniously” in lieu of a specific mental state concern offenses already understood to include a mental element. *See Snapp*, 119 Wn. App. at 621 (felony violation of a no-contact order); *Krajeski*, 104 Wn. App. at 385–86 (unlawful possession of a firearm); *Nieblas Duarte*, 55 Wn. App. at 377 (delivery of a controlled substance). Where the defining statute or preexisting case law define the crime to include a mental element, an imprecise, archaic phrase like “unlawfully and feloniously” may be enough to put an ordinary person on notice. Here, because courts did not read possession of a controlled substance to require a mental state when the information was filed, the phrase would not alert a

reader that a required mental state was being alleged. *See Bradshaw*, 152 Wn.2d at 537; *Cleppe*, 96 Wn.2d at 380.

Finally, the information itself made clear that the State did not use “unlawfully and feloniously” to mean “knowingly” in Count III. The State alleged that all three offenses were committed “unlawfully and feloniously,” including first-degree assault, which does not have knowledge as an element. CP 6–7; RCW 9A.36.011(1). Rather than to stand in for any particular mental element, the State appears to use the phrase as boilerplate in all its charging language. CP 6–7.

In light of the above, no common-sense reader of the information would understand “unlawfully and feloniously” to mean that Mr. Smalley knowingly possessed a controlled substance. *Sullivan*, 196 Wn. App. at 323. Count III of the information must be dismissed. *McCarty*, 140 Wn.2d at 425.

**3. Count I of the information—alleging assault—is deficient for failing to allege the assault was carried out with “unlawful force.”**

As noted, an information that fails to allege all essential elements of a charged offense is constitutionally

deficient. *Pry*, 194 Wn.2d at 751(citing U.S. Const. amend. VI; Const. art. I, § 22). An essential element is any fact that must be proved “to establish the very illegality” of the charged conduct. *Pry*, 194 Wn.2d at 752 (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)).

Count I of the information charged Mr. Smalley with first-degree assault. CP 6. The trial court found Mr. Smalley guilty of second-degree assault, an inferior degree of first-degree assault. CP 53 FF 28, 56 CL 7. Accordingly, to satisfy constitutional notice requirements, the information must allege all the essential elements of second-degree assault or any superior degree of assault (i.e., first-degree assault). RCW 10.61.003; *see State v. Peterson*, 133 Wn.2d 885, 892, 948 P.2d 381 (1997) (information alleging all elements of first-degree assault adequate to support second-degree assault).

Regardless of the degree, assault requires the use of “unlawful force.” *State v. Prado*, 144 Wn. App. 227, 246–47, 181 P.3d 901 (2008); (citing *State v. Hupe*, 50 Wn. App. 277, 748 P.2d 263 (1988)). This requirement excludes

circumstances where force was used lawfully, such as in self-defense. *Cf.* WPIC 35.50 (note on use) (instructions should include “with unlawful force” where “there is a claim of self-defense or other lawful use of force”). Because use of force may be lawful in some circumstances, an allegation of “unlawful force” is needed to establish the “illegality” of the alleged assault. *Pry*, 194 Wn.2d at 752.

Count I alleges Mr. Smalley assaulted Mr. Chambers, but not that he did so using “unlawful force.” CP 6. As a result, the information would not notify a common-sense reader that the charged offense excluded lawful uses of force. *See Sullivan*, 196 Wn. App. at 323 (information must be read using “common sense”). Because Count I excludes an essential element of assault in the second degree, it must be dismissed. *See McCarty*, 140 Wn.2d at 425.

**4. The trial court erred in imposing discretionary community custody supervision fees despite finding Mr. Smalley indigent.**

Courts may not impose discretionary legal financial obligations on defendants who have been found indigent.

RCW 10.01.160(3); *State v. Ramirez*, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees as a condition of community custody are a discretionary legal financial obligation because they “are waivable by the trial court.” *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020); accord *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Where a trial court announces its intent to “impose only mandatory LFOs” yet appears to have inadvertently required payment of supervision fees, remand with instructions to strike the supervision fees from the form judgment and sentence is warranted. *Lundstrom*, 6 Wn. App. 2d at 396 & n.3; accord *Dillon*, 12 Wn. App. 2d at 152.

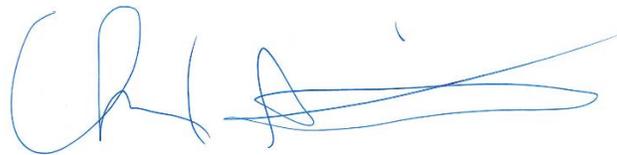
Here, the trial court found Mr. Smalley indigent and waived all non-mandatory financial obligations, including the DNA database fee, criminal filing fee, and \$1200 in public defense costs. RP 483, 490; CP 33. In doing so, the court clearly demonstrated its intent to “impose only mandatory LFOs.” *Lundstrom*, 6 Wn. App. 2d at 396 n.3. Nonetheless, the form judgment and sentence included as a condition of

community custody that Mr. Smalley “pay supervision fees.” CP 35, 40. This Court should remand with instructions to strike the obligation to pay supervision fees. *See Dillon*, 12 Wn. App. 2d at 152; *Lundstrom*, 6 Wn. App. 2d at 396 & n.3.

#### F. CONCLUSION

This Court should reverse Mr. Smalley’s conviction of witness tampering with prejudice and his convictions of second-degree assault and unlawful possession of a controlled substance without prejudice. Alternatively, this Court should remand with instructions to strike the requirement to pay community custody supervision fees.

DATED this 19th day of June, 2020.



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Christopher Petroni, WSBA #46966  
Washington Appellate Project - 91052  
Email: wapofficemail@washapp.org  
chris@washapp.org

*Attorney for David Smalley*

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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|----------------------|---|----------------|
| STATE OF WASHINGTON, | ) |                |
|                      | ) |                |
| Respondent,          | ) |                |
|                      | ) | NO. 54348-6-II |
| v.                   | ) |                |
|                      | ) |                |
| DAVID SMALLEY,       | ) |                |
|                      | ) |                |
| Appellant.           | ) |                |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF JUNE, 2020.



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**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

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**Superior Court Case Number:** 19-1-00819-1

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