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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

David Smalley,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 19-1-00819-1

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The defendant David Smalley stabbed Xavier Chambers in the abdomen in retaliation for disrespecting him at his home. Chambers sustained a potentially life-threatening wound requiring surgery. Smalley's comments in jail phone calls indicate he knew Chambers' final account to police about Smalley intentionally stabbing him was accurate. Despite this, Smalley directed others to contact Chambers in an effort to pressure him into making an untrue statement the stabbing was accidental.

Following a bench trial, the court convicted Smalley of assault in the second degree with a deadly weapon, witness tampering, and unlawful possession of methamphetamine. The court found Chambers credible and Smalley not credible. The court properly used evidence showing Smalley had intentionally stabbed Chambers beyond a reasonable doubt to determine Smalley had attempted to induce Chambers to testify falsely. Sufficient evidence supported the tampering conviction.

The information properly informed Smalley of the essential elements of assault in the first degree and unlawful possession of a controlled substance. The absence of lawful force is not an essential element of assault until it is raised by an accused. Unlawful possession is a strict liability offense not requiring the element of the knowledge. This Court should affirm Smalley's convictions.

## **II. RESTATEMENT OF THE ISSUES**

- A. Was there sufficient evidence of witness tampering where the court found the victim Chambers credible, the defendant Smalley not credible, and the evidence viewed in the light most favorable to the State shows Smalley intentionally stabbed Chambers in the abdomen, acknowledged Chambers' last statement to police was true, and repeatedly directed someone to contact Chambers and get him to sign a statement averring the incident was an accident?
- B. Did the information include the essential elements of the offenses when assault is defined as a touching with unlawful force and unlawful possession of a controlled substance is a strict liability offense not requiring knowledge?
- C. Should this Court strike the provision of the judgment and sentence authorizing DOC supervision fees where the record is unclear regarding the court's intent to strike all non-mandatory costs?

## **III. STATEMENT OF THE CASE**

The defendant David Smalley and the victim Xavier Chambers were acquaintances based on their mutual involvement in the trade of stolen goods and drugs in Lakewood, Washington. 3ARP 67; 5RP 378. They interacted frequently in 2016 and 2017, then lost touch for one to two years. 3ARP 68. In the first few days of March 2019, the two men ran into each other at a Shell station near Smalley's home. 3ARP 68. Smalley invited Chambers to stop by his residence. 3ARP 68.

On March 5, 2019, Chambers arrived at Smalley's residence around 1pm. 3ARP 70. The overhead garage door was open, and Chambers walked

into the garage where at least two other people were present with Smalley. 3ARP 70; 5RP 383; CP 49 (FF 7). Smalley was at the back of the garage speaking with one of the other men present about a drug transaction involving methamphetamine. 5RP 384, 388.

Chambers asked Smalley to loan him his bicycle or give him \$5 for bus fare. 3ARP 70; CP 49 (FF 8). Smalley gave Chambers \$5. 3ARP 71; CP 49 (FF 8). Chambers then asked Smalley for a piece of methamphetamine. 3ARP 74; CP 49 (FF 8). Smalley gave Chambers a small piece of methamphetamine. 3ARP 76-77; CP 49 (FF 8). Chambers walked towards the entrance of the garage to leave. 3ARP 76-77.

Smalley made a comment about doing Chambers a favor. 3ARP 77. Chambers took offense because the \$5 and piece of methamphetamine were supposed to precede further dealings between the two. 3ARP 77-79; CP 49 (FF 8). Chambers walked back to Smalley, dropped the methamphetamine on the ground, and crushed it with his foot. 3ARP 77. As he did so he told Smalley “he was not his five dollar n-----.” 3ARP 78-79; CP 49 (FF 8). He then walked back towards the garage entrance. 3ARP 78.

Smalley felt embarrassed and disrespected in front of the other people present in his garage. 5RP 390; CP 50 (FF 9). He came towards Chambers with the knife in his hand. 5RP 391. Putting his face to his ear, Smalley called Chambers a “n-----” and stabbed him in the abdomen with

the knife. 3ARP 78; CP 50 (FF 9). The wound passed through a T-shirt, fleece shirt, and medium-weight jacket. 3BRP 180, 184; Ex. 18, 33-39. Chambers pulled up his shirt after the stabbing and fatty tissue fell out of the wound. 3ARP 78; CP 50 (FF 10). Smalley gave Chambers a T-shirt to stop the bleeding and told him to get to a doctor. 3ARP 83-84.

Chambers left Smalley's garage and walked a few blocks to a medical clinic where he was transported by ambulance to Madigan Hospital. 3ARP 86, 92; CP 50 (FF 10). Madigan personnel observed a 5-8 centimeter stab wound in Chamber's upper right abdomen just below the rib cage. 5RP 293-94, 296. Elements of his abdominal cavity had spilled from the opening. 5RP 296; Ex. 17. Medical personnel performed an exploratory laparotomy and concluded Chambers was "extremely fortunate" to have escaped potentially life-threatening damage to vital organs and veins in that area of the abdomen. 5RP 295, 298, 305. The stab wound penetrated all layers of the abdominal wall including the skin, subcutaneous fatty tissue, muscle, and the lining of these layers. 5RP 297. Chambers will have a lifelong risk of small bowel obstruction given the injury. 5RP 312.

Chambers initially told medical personnel and police he was stabbed at the park after stepping in the middle of an altercation. 3ARP 89; 3BRP 171; CP 50 (FF 12). The second time he spoke with police he said the assault

took place on a side street. 3BRP 173; CP 51 (FF 14). Police collected surveillance footage and looked for evidence of an altercation at the two locations Chambers described. 3BRP 175. A police officer confronted Chambers after his surgery about the lack of evidence of an altercation at both locations. 3BRP 185-86. Chambers subsequently admitted Smalley had stabbed him in his garage. 3ARP 103; 3BRP 186, 189; CP 51 (FF 18). Chambers explained he lied because telling on someone is unacceptable in his world and he planned to take revenge upon Smalley himself. 3ARP 90, 108; 3BRP 188.

Police arrested Smalley at his home on March 6, 2019. 4RP 223. A bag of methamphetamine was found in his jacket at arrest. 4RP 214, 224. Police observed a wet mop in the garage and smudges of blood on the washing machine. 4RP 254. DNA analysis showed the blood belonged to Chambers. 5RP 343. Smalley initially told police he had no idea how Chambers was stabbed and said he arrived at his house with the wound. 4RP 264. He later provided two additional explanations. 4RP 264. The first was that Chambers had twisted himself into the knife while Smalley was using it to clean his fingernails. 4RP 265. The second was that Chambers had

“chest bumped” him causing the knife to go through his clothing and body “like butter.”<sup>1</sup> 4RP 265.

The State charged Smalley with assault in the first degree based on intent to inflict great bodily harm with a deadly weapon. CP 2. Smalley’s conditions of release prohibited direct or indirect contact with Chambers. CP 75. Smalley remained incarcerated prior to trial and his phone calls from the Pierce County Jail were recorded. 4RP 269-276; Ex. 6A. Smalley called a woman named McKenna Melton on at least 8 occasions between April 6 and May 22, 2019. 4RP 269-73. He instructed Melton to find Chambers and get him to sign a statement saying the stabbing was an accident. 4RP 276.

Smalley’s tone and urgency escalates as time goes on and Melton is unable to produce a statement from Chambers. Ex. 6A; 4RP 269-73. On call 47 on April 7, 2019, Smalley tells Melton that Chambers needs to say “that he initiated the chest bump into me, which is what happened –.” Ex 6A; Ex. 3 (pg. 8). By call 55 on April 13, 2019, Smalley is telling Melton to “[m]ake it a priority. Get over everything else – whatever you’re doing and stop doing it and go find him.” Ex 6A; Ex 3 (pg 47).

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<sup>1</sup> Smalley gave several explanations for how the stabbing occurred at trial. He said Chambers’ body “made contact” with the knife, Chambers was spinning around and “he made contact,” Chambers physically chest bumped him, or that Chambers did not Smalley was right behind him. 5RP 391-393. Smalley said the knife had been down at his side and somehow traveled up to Chambers’ abdomen. 5RP 393, 409-414.

Smalley admits in two different calls that Chambers' last statement to police was the correct statement. Ex. 6A call 47, 51; Ex 3 (pg 12, 33). In call 47 on April 7, 2019, Smalley says, "I lied. And so did he. He lied twice, you know, and then he told the truth in the end." Ex. 6A; Ex. 3 (pg. 12). Similarly, in call 51 on April 11, 2019, Smalley again describes Chambers' different statements. He says, "That's the same shit he did. He lied twice and made such extensive ass lies up (inaudible) everything else -- I've seen the discovery. You know, he -- he covered (inaudible) good for me. You know, and third time, they caught him right when he got out of that surgery. He's still doped up, and he gave it up." Ex 6A; Ex 3 (pg 33). In the same call he later says, "So it's my own fault I'm here. You know what I'm saying? In a lot of ways. He didn't have to crack. At the same time, I understand he was under anesthetic, and that's -- I'm not mad at him at all." Ex. 6A; Ex. 3 (pg. 34).

Smalley tells Melton she can find Chambers at the "old Denny's" and tells her to work with other people he is sending from the Pierce County Jail who will help her. Ex. 6A; Ex. 3 (pg. 24-25, 27-28, 40, 45) Smalley makes partial statements and doesn't fully explain himself on the calls by making comments such as: "But don't say nothing else about nothing else (inaudible) just remember one thing. Okay? The old Denny's in Lakewood. That's all I'm going to say. Okay? The old Denny's in Lakewood. Okay?"

(Call 51, Ex. 3 pg. 25). The old Denny's was a place Chambers frequented. 3ARP 114-15.

Melton contacted Chambers multiple times and using different methods. She met him twice in person. 3ARP 110. On the second occasion she tried to get Chambers to sign a statement. 3ARP 110-11. Chambers explained he did not sign the statement because the incident was not an accident. 3ARP 111, 142, 147. He did not do what Melton wanted him to do because it wasn't true. 3ARP 111. Chambers said Melton subsequently texted him under the auspices of paying him back for something. 3ARP 112-13. Chambers was aware Smalley had asked people to look for him and was concerned for his safety. 3ARP 113, 146; 4RP 279; 5RP 357

The State amended the information prior to trial by adding the crimes of witness tampering and unlawful possession of methamphetamine. CP 6-7. Smalley waived jury and was tried by the court in October 2019. CP 21. The court found Smalley guilty of the lesser included offense of assault in the second degree while armed with a deadly weapon. 6RP 472-76; CP 55 (CL 2-4). The court determined Smalley intended to stab Chambers after feeling disrespected by him. 6RP 474; CP 50 (FF 9). The evidence showed beyond a reasonable doubt Smalley intended to cause Chambers substantial bodily harm by the stabbing rather than intending to cause permanent harm or death. 6RP 475; CP 55 (CL 2-4). The court also

found Smalley guilty of witness tampering and unlawful possession of methamphetamine. 6RP 472, 476; CP 56.

The court's oral rulings and findings on October 11, 2019, were followed by written findings of fact and conclusions of law entered on January 2, 2020. 6RP 472-76; CP 48-57. The written findings referred to and incorporated the court's oral findings. CP 56 (CL 11). The written findings reflect counsel's agreement to the form and content of the findings. CP 57. The court sentenced Smalley to a standard range sentence of 29 months in the Department of Corrections (DOC). CP 34-35. The judgment and sentence included language that DOC might impose supervision fees. CP 35 Smalley timely appealed. CP 42.

#### IV. ARGUMENT

**A. There was Sufficient Evidence Smalley Attempted to Induce False Testimony by his Repeated Efforts to Pressure Chambers to Submit an Untrue Statement the Stabbing was Accidental.**

The court's findings of fact supporting Smalley's conviction for witness tampering are verities on appeal. Following a bench trial, the appellate court reviews whether substantial evidence supports the findings of fact and whether those findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699

(2005). Unchallenged findings of fact and findings supported by substantial evidence are treated as verities on appeal. *Id.*; *Homan*, 181 Wn.2d at 105. The court's conclusions of law are reviewed de novo. *Homan*, 181 Wn.2d at 105. The record indicates the court's findings were unchallenged and thus verities on appeal. CP 54 (FF 33), 56 (CL 8), 57. The findings, including finding 33 pertaining to tampering, are also supported by substantial and sufficient evidence.

Smalley's challenge to the evidence underlying his witness tampering conviction admits the truth of the State's evidence showing he stabbed Chambers and then engaged in repeated efforts to persuade him to describe the assault as an accident. Ex. 3; Ex. 6A; 4RP 269-73. Evidence is sufficient to support a conviction when any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *Id.* at 265-66. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Scanlon*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). Circumstantial and direct evidence are equally reliable. *Id.*

The trial court's assessment that Chambers was credible, and Smalley was not, is not reviewable. The appellate court defers "to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Embry*, 171 Wn. App. 714, 742, 287 P.3d 648 (2012). Credibility determinations in particular are not subject to review. *Cardenas-Flores*, 189 Wn.2d at 266. This Court must accept the trial court's determination that Smalley was not credible. 6RP 473. The court noted, "none of the stories that this defendant gave were true," and "[h]is story, his recitation of events doesn't match with the physical evidence." 6RP 473. In contrast, the court found Chambers and his version of events credible. CP 49 (FF 2); 6RP 473.

The court's finding that Chambers' version of events was credible along with the requirement in a sufficiency evaluation to admit the truth of the State's evidence means that Smalley intentionally stabbed Chambers as he described. *Cardenas-Flores*, 189 Wn.2d at 265-66. Chambers' refusal when urged by Melton to sign a statement describing the stabbing as an accident because it was untrue is also credible and thus true for the sufficiency evaluation. *Id.* Drawn in the light most favorable to the State, one can infer Smalley's repeated and escalating efforts to get Chambers to officially call the incident an accident were efforts to pressure Chambers to change his statement about true events to police.

Additional inferences from the recorded phone calls show Smalley knew Chambers told the truth about the stabbing to police and he was engaged in nefarious efforts to get Chambers to subsequently lie. Smalley's cryptic and incomplete comments to Melton about what she should do, where she could find Chambers, and the people he is sending from jail to help her, demonstrate attempts to hide illicit conduct. Ex. 6A; Ex. 3 (pg. 24-25, 27-28, 40, 45). Smalley's statements about reading the discovery and learning Chambers initially covered well for him and then gave up the truth after his surgery show Smalley knew he had intentionally stabbed Chambers as Chambers had described to police. Ex. 6A; Ex. 3 (pg. 12, 33-34).

Since the evidence and its inferences show Smalley knew he stabbed Chambers intentionally, his efforts to get Chambers to sign a statement saying it was an accident constitute tampering. A person commits the crime of tampering with a witness when he has reason to believe another person will be called as a witness and attempts to induce that person to testify falsely or withhold testimony. RCW 9A.72.120(1)(a); WPIC 115.81. Witness tampering does not require actual contact with the witness by the defendant. *State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 1221 (2005). Smalley's efforts through Melton to get Chambers to change his official account to police constituted attempts to induce him to testify falsely.

Washington courts have repeatedly found sufficient evidence for tampering convictions based on the defendant asking a victim or witness to change his or her statement. In a recent unpublished case, the court found the defendant's active urging of the victim to change her statement was sufficient evidence of an inducement to testify falsely. *State v. Hurley*, 192 Wn. App. 1050, WL 785546 \*4 (2016).<sup>2</sup> In *Lubers*, the court found the defendant's request the victim to write a letter recanting information given to the police was sufficient evidence of tampering. *State v. Lubers*, 81 Wn. App. 614, 622, 915 P.2d 1157 (1996). In *Whitfield*, the court found the defendant telling the victim what she should say to get him out of trouble was sufficient evidence of tampering. *State v. Whitfield*, 132 Wn. App. 878, 897-98, 134 P.3d 1203 (2006). In *Henshaw*, the court noted that pressure and influence exerted upon the victim constitutes witness tampering.<sup>3</sup> *State v. Henshaw*, 62 Wn. App. 135, 138, 813 P.2d 146 (1991). In *Williamson*, the court found the defendant's request the victim "take back" her statement sufficient evidence of tampering. *Williamson*, 131 Wn. App. at 5-7.

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<sup>2</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

<sup>3</sup> This case did not involve a sufficiency challenge but rather whether the real facts doctrine prohibited evidence of tampering as the basis for an exceptional sentence. *Henshaw*, 62 Wn. App. at 138.

Smalley's efforts to get Chambers to change his statement to police were similar to the facts of these cases and sufficient evidence of tampering.

The cases Smalley cites are inapplicable here. In *Rempel*, the defendant asked the victim to "drop the charges," not change her statement. *State v. Rempel*, 114 Wn.2d 677, 83, 785 P.2d 1134 (1990). The Court found the context of the calls showed the defendant was erroneously assuming the victim could halt the prosecution and was not attempting to induce her to testify falsely or not appear. 114 Wn.2d at 83. In contrast, Smalley engages in repeated efforts to induce Chambers to sign a statement contrary to what he told police. Ex 6A; Ex. 3. Smalley also recognized Chambers' last statement to police as true, his cryptic statements to Melton demonstrate his illicit intent, and sending people from the jail to help with the effort demonstrated his intent to pressure Chambers. Ex 6A; Ex. 3.

In *Stroh*, another case discussed by Smalley, the Court found the witness tampering statute implicitly and expressly includes a requirement the defendant know the person he is speaking to about the case will be a witness. *State v. Stroh*, 91 Wn.2d 580, 586, 588 P.2d 1182 (1979). This holding is inapplicable here where Chambers was the victim and was indisputably a witness. The Court in *Stroh* did not find there was a requirement the defendant intend to obstruct justice in his or her efforts to induce a witness to testify falsely. *Id.* at 588. This does not result in the

criminalization of innocent conduct as Smalley argues because the language of the witness tampering statute specifies the defendant must attempt to induce a person to “testify falsely.” RCW 9A.72.120.

Smalley’s argument the witness tampering statute impedes the right to present a defense is without basis. Br. of Appellant at 16. The defendant’s right to present a defense is not absolute. *State v. Lizarraga*, 191 Wn. App. 530, 553, 364 P.3d 810 (2015); *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), *abrogated on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It includes the right to offer testimony, compel the presence of witnesses, and cross-examine witnesses. *Lizarraga*, 191 Wn. App. at 552. It does not encompass contacting witnesses to attempt to induce them to change their statements.

Smalley argues he heard Chambers was telling others the stabbing was an accident and this allowed him to reach out to Smalley about changing his statement. Br. of Appellant at 11. If this were true, those individuals could be called as witnesses to impeach Smalley. ER 607. But it did not permit Smalley to contact Chambers and pressure him into changing his statement to police. RCW 9A.72.120. Under Smalley’s logic a defendant can send multiple people to contact, pressure, and tamper with a witness so long as it can be justified by vague unverified statements, he heard the victim was saying something different than what was told police.

Smalley's argument the court could not use its conclusion the stabbing was intentional beyond a reasonable doubt in its analysis of whether witness tampering occurred is also without basis. The court must make a determination of whether the accused attempted to induce a person to testify falsely and its assessment of the evidence supporting the crime is relevant to that determination. In *Gonzalez*, this Court reasoned that where a reasonable jury could find from the victim's testimony the crime had been committed there was evidence the defendant attempted to induce her to testify falsely by asking her to say otherwise. *State v. Gonzalez*, 2 Wn. App.2d 96, 116, 408 P.3d 743 (2018). Similarly, in this case the court used its assessment Chambers' testimony about the stabbing was credible to find that Smalley attempted to induce him to testify falsely. But in this case Chambers' credibility and the court's finding the crime occurred was not the only evidence supporting tampering. There was also Smalley's statements on the jail phone calls about Chambers' telling the truth after surgery, which corresponded to Smalley's statements to Officer Dier after his surgery about Smalley stabbing him. 3BRP 185-86; Ex. 3A. This evidence combined with Smalley's cryptic instructions to Melton more than establishes he knew he was trying to get Chambers to testify falsely when viewing the evidence in the light most favorable to the State.

There is sufficient and substantial evidence supporting the trial court's findings the elements of witness tampering were met in this case. CP 54 (FF 33). Those unchallenged findings are verities on appeal. This Court should affirm Smalley's witness tampering conviction.

**B. The Information Contained the Essential Elements of Assault and Unlawful Possession of a Controlled Substance.**

The amended information notified Smalley of the essential elements of assault in the first degree and unlawful possession of a controlled substance. An information must include all essential statutory and non-statutory elements of an offense. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). An "essential element" is defined as one "whose specification is necessary to establish the very illegality of the behavior charged." *Id.* The amended information properly notified Smalley he was accused of unlawfully and intentionally assaulting Chambers with the intent to produce great bodily harm, and unlawfully possessing the controlled substance methamphetamine, the essential elements of both offenses. CP 6.

Smalley was able to prepare a defense to both charges having been properly notified of the essential elements. Proper notification of the essential elements of an offense allows the accused to sufficiently prepare a defense. *Johnson*, 180 Wn.2d at 300. Smalley asserted the defense of

unintentionally stabbing Chambers, and in the alternative argued he did not intend to inflict great bodily harm. 6RP 460, 465-66. He did not contest possession of the methamphetamine that was found in his jacket pocket at his arrest. 6RP 467.

Even if this Court erroneously finds that “unlawful force” is an essential element of assault and it was not included in the charging document, this component is present when the document is liberally construed in favor of validity. This Court reviews the constitutional adequacy of a charging document *de novo*. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154 (2016). When there has been no objection prior to appeal, this Court liberally construes the charging document in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). “Even missing elements may be implied if the language supports such a result.” *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). If the necessary elements can be found by fair construction or in any form in the information, reversal is only required where the defendant was actually prejudiced by inartful language. *Kjorsvik*, 117 Wn.2d at 105-06. Smalley did not object to the information prior to his appeal. He suffered no prejudice where he had no defense to assault based on lawful force, and no defense to unlawful possession of a controlled substance. This Court should find the charging document was valid.

**1. “Unlawful force” is not an essential element until raised and the information notified Smalley he was accused of assaulting Chambers unlawfully.**

Although “unlawful force” is not an essential element requiring specification in the information, Smalley was in fact informed an assault involves the use of unlawful force. The amended information alleged Smalley did “unlawfully and feloniously ... intentionally assault” Chambers. CP 6. This informed Smalley in two different ways that he was accused of assaulting Chambers with unlawful force. First, the definition of an “assault” includes the use of unlawful force. *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988), *disapproved of on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Prado*, 144 Wn. App. 227, 243, 181 P.3d 901 (2008); WPIC 35.50 Assault – Definition (comment). Smalley was therefore informed he was accused of using unlawful force by the term assault. Second, the information notified Smalley he was accused of “unlawfully” committing the assault. So even assuming for argument assault was not defined by the use of unlawful force and only involved force, the information informed Smalley he was accused of an “unlawful” assault, i.e., the unlawful use of force.

The information charging Smalley with assault was not required to include the definition of assault. An information is sufficient when it contains the essential elements appearing in the statute and case law, in this

case RCW 9A.36.011. *Johnson*, 180 Wn.2d at 302. The “assault” is the essential element, the act required to establish the illegality of the behavior. *Id.* at 300. Definitions defining and limiting the scope of the essential elements are not themselves essential elements. *Id.* In *Johnson*, the defendant argued the information in his unlawful imprisonment case was deficient because it did not specify that “restrain” was defined as restricting a person’s movement “without lawful authority.” *Id.* at 301. The Court rejected this argument, finding the definition limiting the scope of the term “restrain” was not an essential element of the crime. *Id.* at 302. Here, similarly, the State was not required to include the definition defining and limiting the scope of the term “assault.”

The information does not need to specify the absence of an affirmative defense to assault such as acting with lawful authority. A defense like self-defense does not become an element the State is required to disprove until it is properly raised. *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1063 (1983); *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). If Smalley had alleged he acted in self-defense or otherwise used lawful force, that issue would be pertinent to the essential elements in the jury instructions, not the information. *State v. Pry*, 194 Wn.2d 745, 757, 452 P.3d 536 (2019). In a recent unpublished case, Division III observed that “the language ‘with unlawful force’ is necessary to an assault definition

only if the defendant claims self-defense or another lawful use of force.” *State v. Morganflash*, 9 Wn. App.2d 1001, WL 2226116 at \*3 (2019).<sup>4</sup> The State in this case was not required to allege the lack of an affirmative defense involving lawful force prior to it being raised.

The cases Smalley uses to support his argument the term “unlawful force” should have been in the information are inapplicable to this case. Br. of Appellant at 26. *Prado* applies to the language required in the “to convict” jury instruction for assault when self-defense has been raised. *Prado*, 144 Wn. App. at 246. The essential elements required in the jury instructions differ from those required in the information. *Pry*, 194 Wn.2d at 757. Additionally, *Prado* specifically notes the phrase “unlawful force” is not an essential element in the absence of evidence of self-defense or other lawful force. *Id.* at 246-47; *see also State v. Brooks*, 142 Wn. App. 842, 847, 176 P.3d 549 (2008). In this case, there was no evidence of self-defense or other lawful force requiring inclusion of the phrase “with unlawful force” at any stage.

*Pry* is inapplicable to the present case because there the information inadequately informed the accused of the accusation by merely repeating the title of the crime. *Pry*, 194 Wn.2d at 753-54. The Court found the

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<sup>4</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

information did not apprise the defendant of any of the actions or mental states resulting in culpability for rendering criminal assistance. *Id.* at 757. In contrast, the information in this case informed Smalley he was accused of committing the act of assault and of doing so unlawfully and intentionally. CP 6. These were the acts required to establish the illegality of the behavior. *Johnson*, 180 Wn.2d at 302. Further definition in the information was not required. *Id.*

The information informed Smalley of the essential elements of assault in the first degree.<sup>5</sup> Although not required, it also notified Smalley an assault involves a touching with unlawful force through use of the term “unlawfully” prior to assault, and through the term assault, which is defined as a harmful touching with unlawful force. Even if this Court finds an essential element was not specified, a liberal construal of the information shows “unlawful force” is implied. *Kjorsvik*, 117 Wn.2d at 105-06. This Court should find the allegation of assault in the information was valid.

**2. Knowledge is not an essential element of unlawful possession of a controlled substance.**

Unlawful possession of a controlled substance is a strict liability offense not requiring proof of knowledge. The amended information

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<sup>5</sup> The court properly found Smalley guilty of assault in the second degree, a lesser offense. RCW 10.61.003; RCW 10.61.006; *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000).

contained the essential elements of the crime of unlawful possession of a controlled substance by accusing Smalley of “unlawfully and feloniously possess[ing] a controlled substance, to-wit,: methamphetamine.” CP 7. These are the essential elements contained in RCW 69.50.4013(1) establishing the illegality of the offense. *Johnson*, 180 Wn.2d at 300. Unlawful possession of a controlled substance is a strict liability offense. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). Knowledge is not an “essential element” required for conviction. *Bradshaw*, 152 Wn.2d at 537-38; *Johnson*, 180 Wn.2d at 300. Rather, the accused can assert a defense of unwitting possession. *Bradshaw*, 152 Wn.2d at 538.

This Court must find that “knowledge” is not an essential element of unlawful possession in accordance with controlling case law. This Court is required to abide by a decision of the Washington Supreme Court and cannot overrule its precedent. *State v. Jussila*, 197 Wn. App. 908, 931, 392 P.3d 1108 (2017) (citing *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997)). This Court should find the information contained the essential elements of unlawful possession of a controlled substance.

**C. The Record Does Not Support the Conclusion the Court Intended to Waive all Non-mandatory Fees.**

The record does not show the trial court unequivocally intended to strike all non-mandatory fines. The law now prohibits the imposition of

discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c). RCW 10.01.160(3); RCW 9.94A.760; *State v. Ramirez*, 191 Wn.2d 732, 746, 748, 426 P.3d 714 (2018). The trial court shall order a defendant to pay supervision fees for community custody as determined by the Department of Corrections unless the court waives this requirement. RCW 9.94A.703(2)(d). Here, the trial court did not waive the imposition of the supervision fees. CP 35; 7RP 470.

“Costs” are limited to “expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(2). In dicta, this Court noted that costs of community custody are discretionary LFOs. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). But the supervision fee is not a discretionary “cost” merely because it is a discretionary LFO. Rather, the supervision fee fails to meet the RCW 10.01.160(2) definition of a “cost” because it is not an expense specially incurred by the State to prosecute a defendant or to administer a deferred prosecution program or pretrial supervision.

Based on this reasoning, this Court has held in unpublished decisions that supervision fees were properly imposed by the court and that the court was not required to inquire into the defendant’s ability to pay before imposing the fee. E.g., *State v. Estavillo*, No. 51629-2-II, 2019 WL

5188618 at \*5-6 (Wash. Ct. App. Oct. 15, 2019); *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517 at \*1, 10-11 (Wash. Ct. App. Nov. 5, 2019).<sup>6</sup>

But in *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020), Division I remanded to strike the supervision fee after concluding that the court intended to impose only mandatory LFOs, but inadvertently imposed the supervision fee because it was “buried in a lengthy paragraph on community custody.” *Id.* The Court relied on the trial court’s statement that it would waive the DNA fee, the filing fee, and “simply order \$500 victim penalty assessment, which is still truly mandatory.” *Id.*

Here, the brief record regarding fines does not definitively indicate the court intended to strike all but the truly mandatory costs. 7RP 490-91; CP 33. Therefore, the record does not show the DOC fees were inadvertently imposed under *Dillon*. *Dillon*, 12 Wn. App. 2d at 152. This Court should therefore decline to strike the unobjected to supervision fee.

## V. CONCLUSION

Smalley stabbed Chambers after feeling disrespected by him at his home. Chambers’ account to the police was credible. Smalley’s subsequent repeated attempts to induce Chambers to say otherwise constitutes witness tampering. The information charging Smalley with assault in the first

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<sup>6</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

degree and unlawful possession of a controlled substance contained the essential elements of the crimes. This Court should affirm his convictions.

RESPECTFULLY SUBMITTED this 14th day of August, 2020.

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08/14/20      s/Aeriele Johnson  
Date              Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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